Supreme Court, U.S.
FILED

No. 061024 JAN 23 2007

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ERNEST REYNOLDS III,

Petitioner,

v.

MICHAEL MURPHY a/k/a and f/k/a JOHN MICHAEL MURPHY, and PHILLIPS INVESTMENT RESOURCES, L.L.C.,

Respondents.

On Petition For Writ Of Certiorari To The Second Court Of Appeals Of The State Of Texas

PETITION FOR A WRIT OF CERTIORARI

DAVID FIELDING
Counsel of Record
FIELDING, PARKER & HALLMON, L.L.P.
314 Main Street, Suite 300
Fort Worth, Texas 76102-7423
817/390-0300 (Telephone)

TIM G. SRALLA
TAYLOR, OLSON, ADKINS, SRALLA & EDAM, L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107
817/332-2580 (Telephone)

ROBERT RENBARGER
FRITZ, BYRNE, HEAD & HARRISON, L.L.P.
98 San Jacinto Boulevard, Suite 2000
Austin, Texas 78701-4286
512/476-2020 (Telephone)

Counsel for Petitioner, Ernest Reynolds III

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

A state appeals court, in a civil dispute between private litigants, which the state court perceived to be a "case of first impression", *see* Appendix A (Pet.App.1), has ruled in an opinion now reported at 188 S.W.3d 252, and also at 34 Media L.Rep. 1517, that the First Amendment to the Constitution of the United States bars claims of negligence, negligent misrepresentation, and negligence per se, which had been lodged against the publisher, and the non-publisher author, of an investment newsletter, thus rendering both publisher, and author, absolutely immune from such claims on the basis of a novel judicial review, and unprecedented interpretation, of the First Amendment which finds no support in the actual text of the First Amendment, or in case law from U.S. Supreme Court, and which appears to misconstrue and conflict with case law from the U.S. Supreme Court, and conflict with case law from the U.S. Court of Appeals for the Second Circuit, while purporting to give the investment newsletter publisher, and author, more First Amendment protection from suit than is afforded to the publisher of the New York Times. *See New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964) (newspaper publisher not absolutely immune from civil suit).

1. **Whether the First Amendment bars claims of negligence, negligent misrepresentation, and negligence per se, in disputes between private litigants that involve only "commercial" speech?**

QUESTIONS PRESENTED – Continued

2. **Whether the First Amendment absolutely prohibits, and fully bars, any claims of negligence, negligent misrepresentation, and negligence per se, so as to make a publisher of an investment newsletter absolutely immune from any such claims or causes of action?**

3. **Whether the First Amendment absolutely prohibits, and fully bars, any claims of negligence, negligent misrepresentation, and negligence per se, so as to make the author, who is not the publisher, of an investment newsletter absolutely immune from any such claims or causes of action?**

4. **Whether the First Amendment absolutely prohibits, and fully bars, any claims of negligence, negligent misrepresentation, and negligence per se, so as to make a seller, or author, of an investment advice "hotline", or "Flash Bulletin" fax service, both sent out over inter-state telephone lines, absolutely immune from any such claims or causes of action?**

PARTIES TO THE PROCEEDING

The following is a list of parties that participated in the proceeding in the Supreme Court of Texas.

PETITIONER:

Ernest Reynolds III

David Fielding
Fielding, Parker & Hallmon, L.L.P.
314 Main Street, Suite 300
Fort Worth, Texas 76102-7423
817/390-0300 (Telephone)

Tim G. Sralla
Taylor, Olson, Adkins, Sralla & Edam, L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107
817/332-2580 (Telephone)

E. Lee Parsley
E. Lee Parsley P.C.
100 Congress Avenue, Suite 240
Austin, Texas 78701
512/481-8800 (Telephone)

Robert Renbarger
Fritz, Byrne, Head & Harrison, L.L.P.
98 San Jacinto Boulevard, Suite 2000
Austin, Texas 78701-4286
512/476-2020 (Telephone)

PARTIES TO THE PROCEEDING – Continued

RESPONDENTS:

Michael Murphy a/k/a and f/k/a
John Michael Murphy and
Phillips Investment Resources, Inc.

David Harper
Debra J. McComas
Haynes and Boone, L.L.P.
901 Main Street, Suite 3100
Dallas, Texas 75202
214/651-5000 (Telephone)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Introduction	3
B. Relevant Facts	6
C. The Proceedings Below	8
ARGUMENT	9
A. Discussion Of Legal Issues	9
B. Reasons For Granting The Petition	16
CONCLUSION	18

APPENDICES

A. Opinion from State Appeals Court [in Fort Worth]	App. 1
B. Judgment from State Appeals Court [in Fort Worth]	App. 38
C. Final Judgment from State Trial Court	App. 39
D. Final Ruling from The Supreme Court of Texas	App. 41

TABLE OF CONTENTS – Continued

Page

E. Motion for Rehearing [excerpts] filed at The Supreme Court of Texas.....App. 42

F. Reply Brief [excerpts] filed at The Supreme Court of Texas .....App. 50

G. Petition for Review [excerpts] filed at The Supreme Court of Texas.....App. 54

H. Motion for Rehearing [excerpts] filed at State Appeals Court .....App. 64

I. Reply Brief [excerpts] filed at State Appeals Court .....App. 72

J. Brief of Appellant [excerpts] filed at State Appeals Court .....App. 76

K. The Opinion [excerpts] of the State Appeals Court, as reported at 188 S.W.3d 252, including keynote 14 .....App. 86

L. A Murphy-Phillips internet solicitation .....App. 88

TABLE OF AUTHORITIES

Page

CASES:

American Airlines, Inc. v. Edwards, 1992 WL 373127, 20 Media L.Rep. 1869 (S.D.N.Y. 1992)..... 15

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980)..... 13

Clinton v. Jones, 519 U.S. 925 (1996)..... 4

Cohen v. Cowles Media Company, 501 U.S. 663 (1991).....3, 4, 5, 14, 15

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)....3, 12, 13

Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985).....3, 14, 16

Eimann v. Soldier of Fortune Magazine, Inc., 680 F.Supp. 863 (S.D. Tex. 1988), *rev'd on other grounds*, 880 F.2d 830 (5th Cir. 1989)..... 16

Fitzgerald, Treasurer of Iowa v. Racing Assoc. Of Central Iowa, et al., 539 U.S. 103 (2002)..... 2

Friedman v. Rogers, 440 U.S. 1 (1979).....13, 15

Gertz v . Robert Welch, Inc., 418 U.S. 323 (1974)..... 3, 14

Gobin v. Globe Publishing, 531 P.2d 76 (Kansas 1975)..... 14

Konigsberg v. State Bar of California, 366 U.S. 36 (1961)..... 14

Lowe v. S.E.C., 472 U.S. 181 (1985) .....*passim*

Marbury v. Madison, 5 U.S. 137, 2 L.Ed. 60 (1803).....3, 11

New York Times v. Sullivan, 376 U.S. 254 (1964) 4

Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978)..... 16

TABLE OF AUTHORITIES – Continued

Page

Pennsylvania v. Muniz, 496 U.S. 582 (1990) 2

Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973) 16

Reynolds v. Murphy and Phillips, 188 S.W.3d 252, 34 Media L. Rep. 1517 (Tex.App.-Fort Worth 2006, pet. denied) 1, 5

S.E.C. v. Lowe, 725 F.2d 892 (2nd Cir. 1984) ... 4, 10, 12, 13, 15

S.E.C. v. Lowe, 556 F.Supp. 1359 (E.D.N.Y. 1983) 13

SEC v. Texas Gulf Sulphur, 402 F.2d 833 (2nd Cir. 1968), *cert. den.*, 394 U.S. 976 (1969) 13

U.S. v. Nixon, 418 U.S. 683 (1974) 4

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 16

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 16

UNITED STATES CONSTITUTION:

First Amendment ..... *passim*

Article V 3, 11

Article VI 3, 11

STATUTES:

15 U.S.C. §80b-1 (1976) 12

28 U.S.C. §1257(a) 2

28 U.S.C. §2101(c) 2

TABLE OF AUTHORITIES – Continued

Page

RULES:

Supreme Court Rule 13.1 2

TREATIES:

Russell L. Weaver and Donald E. Lively, UNDERSTANDING THE FIRST AMENDMENT, page 104 (at footnote 60) (Lexis-Nexis – Mathew Bender 2003) 13

Erwin Chemerinsky, CONSTITUTIONAL LAW – PRINCIPLES AND POLICIES at page 919 (footnote 114), 1044-1127, 1125-1127 (Aspen Publishers – 2nd Edition: 2002) 5, 13, 14, 15

John E. Nowak and Ronald D. Rotunda, CONSTITUTIONAL LAW at page 1184 (footnote 7) and at pages 1258-1261, and page 1275 at footnotes 38-40 (West Publishing Co. – 7th Edition: 2004) 13, 14, 15

PETITION FOR WRIT OF CERTIORARI

Ernest Reynolds III respectfully petitions for a writ of certiorari to review the judgment and opinion of the Honorable Court of Appeals for the Second District of Texas at Fort Worth which, in what that court perceives to be a "case of first impression", has held, and ruled, that the First Amendment renders both a publisher, and a non-publisher author, absolutely immune from general law claims of negligence, negligent misrepresentation, and negligence per se, in a civil suit brought by a private citizen who subscribed to an investment-related "newsletter", telephone "hotline", and telefax "Flash Bulletin" service.

OPINIONS BELOW

The Final Judgment from the state trial court is reproduced at Appendix C (Pet.App. 39-40).

The Opinion of the Honorable Court of Appeals for the Second District of Texas at Fort Worth is reproduced at Appendix A (Pet.App. 1-37), and is reported at 188 S.W.3d 252 (*please see* Appendix K (Pet.App. 86-87)), and also at 34 Media L. Rep. 1517.

The specific erroneous ruling here complained of appears at pages 23 and 24 of that Opinion, *see* Appendix A (Pet.App. 21) and Appendix K (Pet.App. 86-87), where the state appeals court stated, and ruled, in most pertinent part, as follows:

> "Accordingly, the trial court did not err by granting summary judgment on First Amendment grounds on Reynolds' negligence and

> negligent misrepresentation claims . . . [and] . . . [a]ccordingly, summary judgment was also proper on Reynolds's negligence per se claim."

The last, final ruling of The Supreme Court of Texas is reproduced at Appendix D (Pet.App. 41).

JURISDICTION

The state court of appeals in Fort Worth signed its Judgment and delivered its opinion on 14 July 2005, and the Supreme Court of Texas made its last, final ruling denying the motion for rehearing of the petition for review on 27 October 2006. The jurisdiction of this court is invoked under 28 U.S.C. §1257(a); *also c.f.* 28 U.S.C. §2101(c) *and* Supreme Court Rule 13.1; *and see Fitzgerald, Treasurer of Iowa v. Racing Assoc. Of Central Iowa, et al.*, 539 U.S. 103, 106 (2002) (U.S. Supreme Court has jurisdiction to review a state court decision resting upon federal, or federal constitutional, grounds) (*citing*: *Pennsylvania v. Muniz*, 496 U.S. 582, 588 n. 4 (1990)).

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Introduction

This case presents issues of federal constitutional law, and of national importance, arising from the unprecedented ruling of a state appeals court which has, albeit unwittingly, exercised judicial review over, and ***de facto*** amended the meaning and scope of, the First Amendment to the Constitution of the United States in a case which that state court considered to be a "case of first impression." *See* Appendix A (Pet.App. 1).

The erroneous, and unprecedented, judicial misinterpretation of the First Amendment by the state appeals court necessitates review by this Court for at least the following reasons:

First, there being nothing in the actual text, or language, of the real First Amendment to give even remote support to the subject state court ruling, if permitted to stand, that ruling would in effect amend the First Amendment. A state appeals court is not empowered to amend the Constitution, *see United States Constitution, Article V* (procedure to amend), or to exercise "judicial review" over that 'Constitution. *C.f. Marbury v. Madison*, 5 U.S. 137 (1803); *and United States Constitution, Article VI* (supremacy clause).

Second, the subject state court ruling badly misinterprets one U.S. Supreme Court opinion, *see Lowe v. S.E.C.*, 472 U.S. 181 (1985) (hereinafter *Lowe*), while conflicting with U.S. Supreme Court opinions in other cases, *see*, *e.g. Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985); *Gertz v . Robert Welch, Inc.*, 418 U.S. 323 (1974); *Cohen v.*

Cowles Media Company, 501 U.S. 663 (1991), and also squarely conflicting with the constitutional law and First Amendment rulings in at least one case from the U.S. Court of Appeals for the Second Circuit. *S.E.C. v. Lowe*, 725 F.2d 892, 898-902 (2nd Cir. 1984) (these constitutional and First Amendment rulings from this federal appeals court were neither reviewed, nor disturbed, when the U.S. Supreme Court later decided this same case on statutory grounds in *Lowe*).

Third, there is no case law precedent from the U.S. Supreme Court to support the subject state court ruling. Indeed, the opinion of the state appeals court does not indicate that it has support in any U.S. Supreme Court authority for its new "rule" of First Amendment law.

Fourth, the subject state court ruling has purported to bestow unprecedented, total, and unqualified immunity from negligence claims upon the publisher, or the author, of an investment newsletter, thus creating a new rule of law that would permit this limited class of purveyors of "commercial speech" more First Amendment protection from civil suit than is afforded to a publisher of "core" speech, such as the *New York Times*. *See*: *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964) (newspaper publisher not absolutely immune from civil suit). In The United States of America no "person" is, or should be permitted to be, immune from legal redress, and thus absolutely above the law (even a President of the United States is not above, or immune from, generally applicable law: *see, e.g. Clinton v. Jones*, 519 U.S. 925 (1996); *and U.S. v. Nixon*, 418 U.S. 683, 708 (1974) which mentions "our historic commitment to the rule of law.")

Fifth, the subject state court ruling grants to publishers, and authors, of investment newsletters, and of investment advice "hotlines" and "Flash Bulletin" Fax Services, both sent out over inter-state telephone lines, absolute immunity from general law negligence claims (including claims of negligence per se). Even the mainstream press does not enjoy any special protection from generally applicable laws, *see*, *e.g. Cohen v. Cowles Media Company*, 501 U.S. 663, 669-670 (1991); nor does it appear that the U.S. Supreme Court has ever held that the First Amendment absolutely shields a publisher (or anyone else) from negligence liability. *See*: *Chemerinsky*, *Erwin*, CONSTITUTIONAL LAW – PRINCIPLES AND POLICIES, pp. 1125-1127 (Aspen Publishers 2nd Edition: 2002) (press not exempt from law of general applicability) (hereinafter CHEMERINSKY).

Sixth, inasmuch as the subject state court ruling is now reported at 188 S.W.3d 252, keynote 14, *see* Appendix K (Pet.App. 86-87), as a case of first impression announcing a new rule of law granting unprecedented First Amendment protection, and immunity, from negligence claims to publishers, and authors, of investment newsletters; therefore, if the U.S. Supreme Court declines to address, and correct, this significant error of federal constitutional law then the new "rule" of First Amendment law created by the state appeals court will permit the existence of a special class, above and beyond the reach of the law, who can, with the impunity of a new state court created First Amendment immunity, commercially practice great mischief, and thereby cause great harm to many millions of innocent Americans who, like Reynolds, and with the encouragement and approval of their federal government, are attempting to maintain personal retirement accounts.

B. Relevant Facts.

Petitioner [Reynolds] was attempting to maintain personal retirement accounts when Respondents solicited him in Texas in 1999. *See* Appendix G (Pet.App. 54-57) *and* Appendix J (Pet.App. 76-82). In this case Respondent Murphy is a financial newsletter author from California. He is not a publisher. Respondent Phillips, the publisher, published, marketed and sold a service/product package of investment advice including a newsletter, and facsimile and telephonic updates featuring Murphy, who was consistently touted by both Respondents[1] as a very knowledgeable, successful investment expert and fund manager. Petitioner, in reliance upon Respondents and their representations (1.) bought and paid for their services, including the newsletter; and (2.) then followed their advice, in reliance upon their continuing representations of Murphy's expertise and capability. In 2002, Petitioner learned[2]

---

[1] Appellee Phillips marketed, published, and sold a newsletter entitled *Technology Investing Newsletter* written by Appellee Murphy. (CR., v. V, pp. 774-75). Murphy's advice was purportedly based upon Murphy's new, tested, and proven successful system. (CR., v. V, p. 793). In solicitations for this newsletter and in the articles he wrote in the newsletter, Murphy claimed to have specialized experience, knowledge, skill and contacts that gave him expert insight into selecting the best and most profitable investments. (CR., v. V, pp. 781-99). For example, he claimed to have managed several successful funds over a 17 year period. (CR., v. V, pp. 781-82). It was represented that Murphy could, and did, analyze the companies and trends in a way that enabled him to reliably predict future developments so that profitable investments could be made. (*eg.* CR., v. V, pp. 781-99). Now the *Michael Murphy Technology Investing Newsletter* (along with its "hotlines" and "Flash Bulletin" Fax Services) has been shut down by Respondents, *see* Appendix L (Pet.App. 88-91), and they are marketing and promoting Murphy's New World Investor advisory service.

[2] In 2001 Reynolds became concerned by the losses in his accounts. (CR., v. XIX, p. 2957). He sent an e-mail complaint to Phillips and

(Continued on following page)

that he had been fooled by Respondents, and that they had caused damage to him through a variety of misconduct over time on a continuing basis. As a result, Petitioner sustained significant monetary loss to his retirement accounts. *See* Appendix G (Pet.App. 54-57) *and* Appendix J (Pet.App. 76-82).

Petitioner sued Respondents on 24 June 2002 in state court in Tarrant County, Texas, where Petitioner resides, seeking recovery of damages caused by Respondents' misconduct, which included fraud, misrepresentation, negligent misrepresentation, negligence and negligence *per se*. This was, and remains, a civil dispute between private parties seeking recovery of damages under general

---

Murphy raising his concerns. (CR., v. XIX, p. 2957). He never received a response. (CR., v. XIX, p. 2957).

On or about April 30, 2002, Reynolds began learning that the representations made to him concerning both Murphy's qualifications and the quality of Murphy's advice were inaccurate. (CR., v. XIX, p. 2951). Reynolds learned that at the same time Murphy had been advising Reynolds and the other subscribers to Technology Investment Newsletter to buy and hold Microsoft anticipating a growth in value, he had been advising subscribers to a different newsletter called the Overpriced Stock Service to "sell short" on Microsoft because he believed the price would go down. (CR., v. XVIII, p. 2836). Still further inquiry revealed that Phillips had concealed Murphy's true name in its material. (CR., v. XIX, p. 2950). Reynolds also learned Murphy had been convicted (albeit pardoned) for federal felony offenses of two armed bank robberies, and was a former drug user. (CR., v. XIX, pp. 2957-58).

He also learned that Murphy's "successful" track record of managing funds was, to say the least, less than represented. For example, at the relevant times Murphy was the portfolio manager of the Murphy New World Technology Fund and the Murphy Technology Convertibles Fund. (CR., v. XIII, pp. 2135-36). Both of these funds under-performed the S&P 500 index. (CR., v. XIII, pp. 2146-53). The Murphy New World Technology Fund had an average total return of negative 4.10% for the five year period ending November 30, 2000. (CR., v. XIII, p. 2144).

laws. Venue was not challenged. No attempt was made to remove to federal court. *See* Appendix G (Pet.App. 54-57) *and* Appendix J (Pet.App. 76-82).

C. The Proceedings Below.

Suit was filed 24 June 2002, and first set for trial on 1 March 2004. On 15 August 2003, the trial court considered motions for summary judgment filed by the Defendants [here, Respondents], later granting same by letter [on 2 September 2003] and order [on 8 September 2003]. Respondents' argument at the summary judgment hearing was based largely upon a misinterpretation of *Lowe v. S.E.C.*, 472 U.S. 181 (1985), which Respondents, Murphy and Phillips, claimed to be a First Amendment case from the U.S. Supreme court. *See* Appendix J (Pet.App. 82) *and see* Appendix G (Pet.App. 57). Respondents since have stated and admitted, on appeal, in materials filed by them before The Supreme Court of Texas, that the *Lowe v. S.E.C.* is not on point. *See* Appendix F (Pet.App. 52).

A timely appeal was made from the trial court to the appropriate state appeals court, which sits in Fort Worth.

The state appeals court's first opinion was withdrawn after Petitioner [Appellant/Plaintiff, below] filed a motion for re-hearing; but the newly issued opinion, on 14 July 2005, contains serious errors of federal constitutional law in its unprecedented holding that: "the trial court did not err by granting summary judgment on First Amendment grounds on Reynolds's negligence [and negligence *per se*] and negligent misrepresentation claims." *See* Appendix A (Pet.App. 21).

A timely Petition for Review was filed before the Supreme Court of Texas; and subsequently a timely Motion for Rehearing was filed before that court by Petitioner. The Supreme Court of Texas made its last, final ruling, denying the Motion for Rehearing, on 27 October 2006.

ARGUMENT

A. Discussion Of Legal Issues

The Fort Worth Court erroneously held, Appendix A (Pet.App. 21), at pages 23 and 24 of its opinion that:

> **"the trial court did not err by granting summary judgment on First Amendment grounds on Reynolds's [sic] negligence [and negligence per se] and negligent misrepresentation claims."**

The Fort Worth Court arrived at this error primarily through misinterpretation of *Lowe v. S.E.C.*, *supra*, and misplaced reliance on a couple of obscure lower court decisions based upon tortured readings of *Lowe*. *See* Appendix A (Pet.App. 16) (opinion discussing the *Ginsburg* and *Daniel* cases).

The only constitutional issue raised by Respondents in the trial court was a claim by them that *Lowe* established that the First Amendment barred the claims made by Reynolds. *See* Appendix J (Pet.App. 82) *and see* Appendix G (Pet.App. 57). Now [in their Response To Petition For Review, filed before The Supreme Court of Texas, at pages 7 and 8] even Respondents admit that:

> "the *Lowe* opinion does not base its holding on First Amendment grounds. . . ."

Indeed, as Respondents also finally did admit on appeal, *Lowe* was decided by the U.S. Supreme Court on purely statutory grounds, interpreting a federal statute not at all pertinent to the instant case. *See* Appendix F (Pet.App. 52). Unlike this instant case, *Lowe* was brought by the federal government, under a federal statute, seeking prior restraint of publication. The instant case is not brought by any arm of government: it is a civil dispute between private litigants. The instant case is not brought under the federal statute at issue in *Lowe*. The instant case does not seek any prior restraint.

As noted above, the Fort Worth Court has erroneously held, on First Amendment grounds, and on no other basis, that:

> "the trial court did not err by granting summary judgment on[Reynolds'] . . . negligence [and negligence per se] and negligent misrepresentation claims. . . ."

The U.S. Supreme Court did not so hold in *Lowe*, or any other case law. In fact, when *Lowe* was considered on constitutional grounds by the U.S. Second Circuit Court of Appeals, that learned court decided all of the U.S. Constitutional law points squarely in favor of the position of Petitioner Reynolds, *see S.E.C. v. Lowe*, 725 F.2d 892 (2d Cir. 1984), and these First Amendment rulings of the federal Second Circuit have never been disturbed or overruled, and are based upon a well developed body of law announced by the U.S. Supreme Court in not one, but many cases, as shown and discussed herein below.

Contrary to U.S. Supreme Court precedent, the state appeals court erred by ruling that the First Amendment to the U.S. Constitution bars claims of negligence, negligence *per se*, and negligent misrepresentation in disputes between private litigants that involve only "commercial" speech.

Though a state appellate court is not empowered to amend the U.S. Constitution,[3] exercise "judicial review" over that Constitution,[4] or overrule or directly conflict with caselaw from the U.S. Supreme Court, the subject ruling from the state appeals court improperly does these things with its unprecedented holding that in this case, involving only private litigants and commercial speech, and not involving prior restraint, the First Amendment bars common law claims of negligence, negligence *per se*, and negligent misrepresentation. The opinion reaches this conclusion through misinterpretation of *Lowe v. S.E.C.*, 472 U.S. 181 (1985) and misplaced reliance on a couple of obscure lower court decisions, *see* Appendix A (Pet.App. 16) (the cases are the *Ginsburg* and *Daniel* cases), which were based upon tortured readings of *Lowe*.[5]

The only constitutional issue raised by the Defendants in the trial court was a claim that *Lowe* established that the First Amendment barred Reynolds' claims. *See* Appendix J

---

[3] *See* UNITED STATES CONSTITUTION, Article V (procedure to amend).

[4] *C.f. Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803); *and* UNITED STATES CONSTITUTION Article VI (supremacy clause).

[5] Yet, the state appeals court recognizes that "*Lowe* is not directly on point," and correctly notes that the First Amendment does not bar claims for breach of contract, fraud and misrepresentation and DTPA violations.

(Pet.App. 82) *and see* Appendix G (Pet.App. 57). *Lowe* is not a First Amendment case, and the First Amendment does not bar or restrict claims against either of the Defendants. *Lowe*, 472 U.S. 181, is not even a holding based on constitutional principles. The opinion in the Second Circuit that was being reviewed in *Lowe*, styled *S.E.C. v. Lowe*, 725 F.2d 892 (2d Cir. 1984), had held that the Investment Advisers Act, 15 U.S.C. §80b-1 (1976) *et seq.*, required registration by publishers of newsletters as investment advisers and that the First Amendment permitted such regulation. In discussing the constitutional issue, the federal circuit court decided against the publisher and against any notion that the First Amendment protected a newsletter publisher from a civil suit, citing several U.S. Supreme Court cases as authority. 752 F.2d at 898-902. The Second Circuit held that investment newsletters involved commercial speech, *S.E.C. v. Lowe*, 752 F.2d at 900-901, that commercial speech is not entitled to the full protection of the First Amendment, *id.* at 896, and that even the "publisher" of a newspaper has no special immunity from the prosecution of general laws (including common law actions for negligence such as misrepresentation). *Id.* at 899 (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)).

Reviewing the Second Circuit's decision in *Lowe*, Justice Stevens framed the issue as whether the publisher could be permanently enjoined from publishing nonpersonalized investment advice and commentary because the publisher was not registered under the Act. He noted that the court should not decide a constitutional question if there is some other ground upon which to dispose of the case, and analyzed the statute there at issue to determine if the case could be decided on statutory grounds. *Lowe* at

472 U.S. at 190. After deciding the case solely on federal statutory grounds, not pertinent in the instant case, the *Lowe* opinion stated, at 472 U.S. 210: "[W]e need not specifically address the constitutional question we granted certiorari to decide."

Clearly, Justice Stevens took care to decide *Lowe* so as to avoid any constitutional issue, simply deciding that a "publisher" (not an "author") did not come within the purview of the federal statute there in issue because that statute said it did not apply to a "publisher."[6]

From the trial court forward, *Lowe* was never protecting an "author." *Lowe* was both author and publisher, but the case only was about whether a certain federal statute applied to a publisher. *See S.E.C. v. Lowe*, 556 F.Supp. 1359 (E.D.N.Y. 1983) *and Lowe v. S.E.C.*, 472 U.S. 181.[7]

---

[6] *See* Russell L. Weaver and Donald E. Lively, UNDERSTANDING THE FIRST AMENDMENT, page 104 (at footnote 60) (Lexis-Nexis – Mathew Bender 2003); *see also* Erwin Chemerinsky, CONSTITUTIONAL LAW – PRINCIPLES AND POLICIES at page 919 (footnote 114) (Aspen Publishers – 2nd Edition: 2002); *and* John E. Nowak and Ronald D. Rotunda, CONSTITUTIONAL LAW at page 1184 (footnote 7) (West Publishing Co. – 7th Edition: 2004) (hereinafter referred to as NOWAK AND ROTUNDA).

[7] The Supreme Court could not have disturbed the Second Circuit's constitutional law rulings in *S.E.C v. Lowe* without overruling its own prior cases that the Second Circuit had relied upon. There were many such rulings (*see* 725 F.2d at 898-902), including *Butts*, *supra*, in which Justice Harlan stated that a business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. . . . " 388 U.S. at 150. *S.E.C. v. Lowe* also cited cases showing that the "speech" in question is "commercial speech," such as *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 n. 6 (1980), and cases showing this "speech" is subject to regulation, like *Friedman v. Rogers*, 440 U.S. 1 (1979) *and SEC v. Texas Gulf Sulphur*, 402 F.2d 833 (2nd Cir. 1968, *cert. den.*, 394 U.S. 976 (1969). The Supreme Court did not

(Continued on following page)

There does not appear to be any authority from the text of the First Amendment or from U.S. Supreme Court precedent to grant an author immunity from a civil negligence suit.

Lowe does not hold that the First Amendment protects a publisher, or an author, from negligence liability. *See Lowe, generally*, 472 U.S. 181, *et seq.* It does not appear that the United States Supreme Court has ever so held. *See* CHEMERINSKY at pages 1125-1127 (press not exempt from law of general applicability). In *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), Dun & Bradstreet was sued and tried (and failed, ultimately) to raise a First Amendment "shield" defense. Suit was filed in a Vermont state court and resulted in a negligence verdict returned against Dun & Bradstreet. The Supreme Court affirmed the Plaintiff's verdict. *See Dun & Bradstreet.* This decision is in keeping with other authorities, as well.[8] In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-347 (1974), the Court appears to hold clearly that the First Amendment does not bar negligence claims (*see especially* the discussions at Key note 5); *see also Konigsberg v. State Bar of California*, 366 U.S. 36 (1961), *at footnote* 10.

---

disturb its earlier rulings when it decided *Lowe* on statutory grounds, *nor has it disturbed them since. C.f., Dun & Bradstreet v. Greenmoss Builders,* 492 U.S. 749 (1985); *and see Cohen v. Cowles Media Company*, 501 U.S. 663 (1991) ("Generally applicable laws do not offend the First Amendment. . . .").

[8] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-347 (1974); NOWAK AND ROTUNDA at page 1275 (notes 38-40, and see text at that point); *and c.f. Gobin v. Globe Publishing*, 531 P.2d 76 (Kansas 1975) (First Amendment does not bar negligence suits by plaintiffs who are not "public figures").

Even the mainstream press does not enjoy any special protection from generally applicable laws like negligence claims. In *Cohen v. Cowles Media Company*, 501 U.S. 663 (1991), the Court observed:

> "Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. . . . [E]nforcement of such general laws against the press is not subject to stricter scrutinity than would be applied to enforcement against other persons or organizations."

501 U.S. at 669-670.[9]

Negligence law is simply part of the body of "[g]enerally applicable laws." This is clear, and nobody in this case has tried to argue to the contrary.

Further, the First Amendment fails to protect the Defendants in this case because their "speech" was commercial speech,[10] which enjoys much less protection under the First Amendment, as a general rule, than political speech.[11] Commercial speech has been defined as "speech

---

[9] A leading treatise states: "The Supreme Court consistently has refused to find that the protection of freedom of the press entitled it to exemption from general regulatory laws. For example, attempts by the press to receive constitutionally based exemptions to antitrust statutes, labor laws, and liability under state contract law have been expressly rejected." CHEMERINSKY at 1125.

[10] *See S.E.C. v. Lowe*, 725 F.2d at 900; *see also American Airlines, Inc. v. Edwards*, 1992 WL 373127, 20 Media L.Rep. 1869, *at footnote* 1 (S.D.N.Y. 1992).

[11] *See* CHEMERINSKY at pages 1044-1127; NOWAK & ROTUNDA at pages 1258-1261. The U.S. Supreme Court has stated that "commercial speech is linked inextricably to commercial activity." *Friedman v.*

(Continued on following page)

which does 'no more than propose a commercial transaction,'. . . ." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting from *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, at 385 (1973)). Commercial speech is speech related solely to the interest of the speaker and his audience.[12] Core speech, on the other hand, is defined as speech containing "ideological expression" that is "integrally related to the exposition of thought." *See Virginia St. Bd. of Pharmacy* at 425 U.S. at 779 (Stewart, J. concurring).

B. Reasons For Granting The Petition

The unprecedented and erroneous ruling of First Amendment "law" by the state appeals court improperly deprives Petitioner, and all other Americans similarly situated, of general law claims of negligence, negligent misrepresentation, and negligence *per se*. If permitted to stand, this erroneous ruling would improperly deprive many Americans of such claims, while giving an unprecedented "free pass" to a privileged class of publishers, and authors, of investment newsletters (and related services, including "hot lines" and "Flash Bulletins" delivered over

---

Rogers at 440 U.S. at 10, *footnote* 9. Publications which do no more than "inform private economic decisions" have been held to constitute such speech. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Commercial speech occupies a "subordinate position in the scale of the First Amendment values." *Dun & Bradstreet*, 472 U.S. at 759, *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978).

[12] *See, e.g.*, opinion of Judge Hittner in *Eimann v. Soldier of Fortune Magazine, Inc.*, 680 F.Supp. 863 (S.D. Tex. 1983), *rev'd on other grounds*, 880 F.2d 830, 865 n.2 (5th Cir. 1989).

interstate telephone lines), to stand above the law, immune from legal redress, with impunity that will permit them to practice mischief, and thereby cause harm to all of the innocent Americans who, with the encouragement and approval of their federal government, are attempting to maintain personal retirement accounts.

The erroneous, and unprecedented, state appeals court misinterpretation of First Amendment law is of national importance because it purports to announce a new "rule" of First Amendment constitutional law. State courts are not empowered to amend, revise, or judicially review the Constitution of the United States of America, and should not be permitted to do so.

There is no support in the textual language of the First Amendment, or in rulings from the U.S. Supreme Court, for the erroneous ruling of the state appeals court.

The erroneous ruling of the state appeals court misinterprets one case from the U.S. Supreme Court, while conflicting with U.S. Supreme Court opinions in other cases, and also squarely conflicting with First Amendment rulings in at least one case from the U.S. Court of Appeals for the Second Circuit. If constitutional law, and federal law, are to have uniformity, and if the opinions of law of the U.S. Supreme Court and the federal appeals courts are to be enforced as law to be honored and followed in the United States, then this sort of erroneous ruling truly requires correction; and the only court that can make that needed correction at this time and in this case is the United States Supreme Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID FIELDING
Counsel of Record
FIELDING, PARKER & HALLMON, L.L.P.
314 Main Street, Suite 300
Fort Worth, Texas 76102-7423
817/390-0300 (Telephone)

TIM G. SRALLA
TAYLOR, OLSON, ADKINS, SRALLA & EDAM, L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107
817/332-2580 (Telephone)

ROBERT RENBARGER
FRITZ, BYRNE, HEAD & HARRISON, L.L.P.
98 San Jacinto Boulevard, Suite 2000
Austin, Texas 78701-4286
512/476-2020 (Telephone)

Attorneys for Petitioner, Ernest Reynolds III

APPENDIX A

[SEAL]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-03-294-CV

ERNEST REYNOLDS, III — APPELLANT

V.

MICHAEL MURPHY A/K/A AND F/K/A JOHN MICHAEL MURPHY AND PHILLIPS INVESTMENT RESOURCES, L.L.C. — APPELLEES

FROM THE 17TH DISTRICT COURT
OF TARRANT COUNTY

OPINION

Introduction

This case of first impression involves the potential liability of an author and publisher of an investment-related newsletter to one of its subscribers who alleges that he incurred losses as a result of making investments in accordance with recommendations in the newsletter. Appellant Ernest Reynolds, III appeals from a summary judgment granted in favor of appellees Michael Murphy a/k/a and f/k/a John Michael Murphy and Phillips Investment Resources, L.L.C.

Reynolds challenges the summary judgment in nine issues, complaining specifically that (1) the United States Supreme Court holding in *Lowe v. Securities and Exchange Commission*,[1] protecting publishers from prior restraint of free speech by federal agencies, does not extend to abolish all private causes of action for the consequences of a misuse of speech, (2) the limited First Amendment protection of *Lowe* should not be extended to shield publishers and nonpublisher authors of harmful speech from liability for their actions, (3) the no-evidence motion for summary judgment was premature, (4) the trial court abused its discretion by denying Reynolds's motion for continuance because the discovery deadline had not passed and appellees refused to adequately respond to discovery, (5) Reynolds presented sufficient evidence on each of his causes of action to defeat appellees' no-evidence motion for summary judgment, (6) Reynolds established genuine questions of material fact as to each challenged element of his various causes of action,[2] (7) the trial court erred by considering appellees' objections to Reynolds's evidence filed for the first time on the date of the motion for summary judgment hearing, (8) the trial court erred by its evidentiary rulings, and (9) the trial court erred by denying Reynolds's motion to reform the order. We affirm in part and reverse and remand in part.

---

[1] 472 U.S. 181, 105 S. Ct. 2557 (1985).

[2] Appellees contend Reynolds waived his challenge to the summary judgment because he failed to address each ground appellees asserted in their motion. But Reynolds has presented a general issue on appeal with respect to the propriety of the summary judgment; thus, he has not waived his challenge to the propriety of the summary judgment in appellees' favor. *See* TEX. R. APP. P. 38.9; *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970); *see also Plexchem Int'l, Inc. v. Harris Appraisal Dist.*, 922 S.W.2d 930, 930 (Tex. 1996).

Background

In 1999, Reynolds received an advertisement for *Technology Investing,* a newsletter published by Phillips and authored by Murphy. Reynolds ordered a subscription by phone and began receiving the newsletter as well as supplemental faxes and email bulletins. In his pleadings, Reynolds alleges that he relied on the newsletter for "research and information in making investment decisions" and that he attempted to follow the advice given in the newsletter.[3] Reynolds also alleges in his pleadings that in 2001 he became concerned about the advice he was receiving in the newsletter. Specifically, he was not seeing the returns on his investments that the newsletter described. Eventually, he sold those stocks at a loss despite Murphy's recommendation to hold the stock as a long-term investment.[4]

Reynolds sued appellees for breach of contract, negligence, negligent misrepresentation, fraud and misrepresentation, and violations of the Texas Deceptive Trade

---

[3] Reynolds does not specify any particular advice that he followed or stocks he purchased or sold in reliance on the advice in the newsletter, other than to allege that instead of selling Microsoft stock when its price fell, he "held" it in accordance with Murphy's advice. But Reynolds does admit that he eventually sold his Microsoft stock at a loss against Murphy's advice.

[4] Although this appears to be an admission that the cause of Reynolds's losses was his own failure to follow the advice in the newsletter, it is not dispositive of all of Reynolds's claims because appellees did not allege this admission as a ground for summary judgment on all of Reynolds's claims. *See Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002); *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997).

Practices Act[5] (DTPA). Appellees filed no-evidence and traditional motions for summary judgment. The trial court granted summary judgment for appellees without stating the grounds upon which the judgment was based.

Procedural Issues

Reynolds appeals several procedural matters, some of which we must address before turning to the substance of the summary judgment issues, Appellees filed both a no-evidence and a traditional motion for summary judgment. Several of Reynolds's complaints relate to the discovery process; Reynolds contends generally that appellees stonewalled him during discovery and that he did not have enough time to complete discovery and obtain evidence to defeat the no-evidence motion, through no fault of his own.[6] Although when both no-evidence and traditional summary judgment motions are filed we usually address the no-evidence motion first, *see Ford Motor Co. v. Ridgway,* 135 S.W.3d 598, 600 (Tex. 2004), here we will review the propriety of granting the traditional summary judgment first because it is dispositive of the majority of Reynolds's claims.[7] Therefore, we need not address Reynolds's third

---

[5] *See* TEX. BUS. & COM. CODE ANN. § 17.46(b)(5), (7), (8), (12), (24) (Vernon Supp. 2004-05).

[6] Although we do not condone gamesmanship in the discovery process, we do not address those issues in this case because other issues are dispositive.

[7] Although one of Reynolds's complaints is that the trial court improperly granted summary judgment before the deadline for completing discovery in the case, we note that a traditional summary judgment is not subject to the same restrictions as a no-evidence summary judgment, which may not be granted until an adequate time for discovery has passed. *See* TEX. R. CIV. P. 166a(c), 166a(i); *Clemmons v.*

(Continued on following page)

through fifth, and the part of Reynolds's ninth, issues pertaining to discovery matters. *See* TEX. R. APP. P. 47.1; *Tex. Mut. Ins. Co. v. Surety Bank, N.A.,* 156 S.W.3d 125, 131 n.4 (Tex. App. – Fort Worth 2006, no pet.).

The remainder of Reynolds's ninth issue relates to whether the trial court should have granted Reynolds's motion to reform the judgment to specify the grounds upon which it granted summary judgment. We find no authority, nor does Reynolds cite any, requiring a trial court to specify the grounds upon which it grants summary judgment. *Cf. Provident Life & Accident Ins. Co. v. Knott,* 128 S.W.3d 211, 215 (Tex. 2003) (citing long-standing rule that trial court order granting summary judgment without specifying grounds must be affirmed if any theories presented to trial court and preserved for appellate review are meritorious). Thus, we overrule the remainder of Reynolds's ninth issue and turn to his evidentiary and discovery issues.

Reynolds's seventh and eighth issues complain about the trial court's rulings on the parties' summary judgment evidence. The trial court denied Reynolds's objections to appellees' evidence and granted appellees' objections to Reynolds's evidence. A trial court's rulings admitting or excluding evidence are reviewable under an abuse of discretion standard. *Nat'l Liab. & Fire Ins. Co. v. Allen,* 15 S.W.3d 525, 527 (Tex. 2000). An appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis in the record for the ruling. *Owens-Corning Fiberglas Corp. v. Malone,* 972 S.W.2d 35, 43 (Tex. 1998).

Citizens Med. Ctr., 54 S.W.3d 463, 466 (Tex. App. – Corpus Christi 2001, no pet.).

In his seventh issue, Reynolds claims that the trial court erred by considering appellees' objections to his responsive summary judgment evidence because their objections were untimely filed. Appellees did not file their objections to Reynolds's evidence until the day of the summary judgment hearing. Generally, the nonmovant must file its response or reply (including any objections to the movant's evidence) "not later than seven days prior to the day of (the) hearing," TEX. R. CIV. P. 166a(c). A movant's exceptions should be filed at least three days before the hearing. TEX. R. CIV. P, 21; *McConnell v. Southside ISD,* 858 S.W.2d 337, 343 n.7 (Tex, 1993).[8] But a movant's objections to a nonmovant's response that are filed the day of the hearing are not untimely and may be considered and ruled upon by the trial court. *Shelton,* 144 S.W.3d at 119. Thus, we overrule Reynolds's seventh issue.

In his eighth issue, Reynolds contends that the trial court erred by granting appellees' objections to his summary judgment evidence and by denying his objections to some of appellees' evidence. As an initial matter, we need not determine if the trial court abused its discretion by denying Reynolds's objections to appellees summary judgment evidence because, as we explain below, even disregarding that evidence, Reynolds did not raise a fact issue on appellees' summary judgment grounds. *See* TEX. R. APP. P. 47.1. As to appellees' objections to Reynolds's evidence, which the trial court granted in its order granting

---

[8] A movant's exception in these circumstances is a complaint that the issues identified in the nonmovant's response as defeating summary judgment are unclear or ambiguous. *See McConnell,* 858 S.W.2d at 343; *Shelton v. Sargent,* 144 S.W.3d 113, 119 (Tex. App. – Fort Worth 2004, pet. denied).

summary judgment, Reynolds presented the following items as summary judgment evidence: his affidavit, a set of requests for admissions that he claimed were deemed, an excerpt from a publication entitled *Overpriced Stock Service,* and a copy of an article purporting to be from TheStreet.com. Appellees timely objected to the purported deemed admissions, claiming that they were not deemed because appellees timely filed a motion for protective order with respect to the requests within the thirty-day period set forth in the rules. *See* TEX. R. CIV. P. 192.4, 192.6, 198.2; *In re Edge Capital Group, Inc.,* 161 S.W.3d 764, 766-67 (Tex. App. – Beaumont 2005, orig. proceeding) (noting that trial court has discretion to narrow scope of discovery to protect party's legitimate interests, but also acknowledging rule 192.6's admonishment that a motion for protective order should not be filed when an objection or assertion of privilege is appropriate). Reynolds claims that the motion for protective order did not prevent the requests from being deemed admitted because the trial court never ruled on the motion. Thus, Reynolds contends that appellees' supplemental response was their first one, that it was untimely, and that the admissions were deemed admitted. We disagree.

A "party must state specifically the legal or factual basis for [its] objection [to propounded discovery] and the extent to which the party is refusing to comply with the request." TEX. R. CIV. P. 193.2(a). An objection that is not made within the time required by the discovery rules or by court order, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown. TEX. R. CIV. P. 193.1, 193.2(e).

A party from whom discovery is sought may also, within the time for a response, move for a protective order.

TEX. R. CIV. P. 192.6(a). A party should not move for protection when an objection is appropriate, but a motion for protective order does not waive any objections. *Id.* A trial court may grant a protective order to protect a party from "undue burden, unnecessary expense, [or] harassment" TEX. R. CIV. P. 192.6(b).

Appellees claimed in their motion for protective order that the 4.98 requests for admission – Reynolds's third set – were unduly burdensome and harassing. In addition to their general contention, appellees objected to some of the admissions on specific grounds. After the thirty-day period expired, appellees filed what they called a supplemental response, answering some of the admissions and objecting to others. The trial court never ruled on the motion for protective order.

Appellees' summary judgment evidence shows that in addition to the motion for protective order, which was filed on May 20, 2003, appellees also attached to the motion answers to the requests that asserted appellees' general objections and also contained more specific objections to certain, but not all, of the requests. Reynolds contends that the general objections were not sufficient to constitute a complete response. *See* TEX. R. CIV. P. 193.1. But requiring appellees to file specific objections to each request before obtaining a ruling on their motion would defeat the purpose of filing a motion in the first place, which is expressly allowed by the rules. *See* TEX. R. CIV. P. 192.6(b); *cf. Grass v. Golden,* 153 S.W.3d 659, 662 (Tex. App. – Tyler 2004, orig. proceeding) (noting that under rule 192.6(a), party seeking protection from time and place of discovery must state a *reasonable* time and place for discovery with which it will comply). In addition, Reynolds cites no authority in his brief directing us to hold otherwise. *See,*

e.g., Shelton, 144 S.W.3d at 119 (waiving point on appeal for failure to cite authority). He does not cite any authority, nor have we found any, holding that the filing of a motion for protective order within the time period for answering requests for admissions is not sufficient to prevent those admissions from being deemed if the court does not eventually rule on the motion. *See id.* Furthermore, although rule 192.6 does not specify whether the party seeking a protective order or the party opposing a protective order has the burden to request a hearing on such a motion, rule 193.4(a) provides that any party may request a hearing on an objection made under rule 193. TEX. R. CIV. P. 192.6, 193.2, 193.4(a); *see Franco v. Franco,* 81 S.W.3d 319, 342 (Tex. App. – El Paso 2002, no pet.). "If neither party asks for a hearing [on the objections], the party who sent the request for discovery waives the requested discovery." MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES * CIVIL TRIALS 341 (Michol O'Connor & Byron P. Davis eds., 2005). Thus, Reynolds was responsible for obtaining a hearing on this matter, and he did not. We conclude that the trial court did not abuse its discretion by concluding that the requests were not deemed admitted and by granting appellees' objections to the requests for admissions attached to Reynolds's response.

Reynolds also complains about the trial court's granting appellees' objections to his affidavit. Appellees objected to nearly every sentence in the affidavit. But we need not address each objection. Considering the affidavit in the light most favorable to Reynolds, as we must, and ignoring all conclusory statements in the affidavit, which are not

proper summary judgment evidence,[9] we glean the following from his affidavit:

- Appellees routinely and repeatedly used the United States mail and interstate telephone lines to solicit, contact, and deliver information to Reynolds;
- Reynolds paid appellees many hundreds of dollars, which appellees collected in payment more than once;
- Appellees made representations to and contracted with Reynolds with respect to the newsletter, and it appears appellees sold the same thing to many others in Texas, the United States, and outside the United States;
- Reynolds believed and trusted appellees and came to believe the *Technology Investing* newsletter was reliable and read it regularly. He also regularly called the hotline for Murphy's advice and received and read many of the flash bulletins. He got a lot of information and advice from appellees who advertised and promoted Murphy;
- Appellees represented that Murphy had special experience, knowledge, skill, and special contacts and had developed a new, but successful and tested method for selecting the best and most profitable investments, that he could "safely lead . . . subscribers down the path to build . . . big profits over time";

---

[9] *See Seaway Prods. Pipeline Co. v. Hanley*, 153 S.W.3d 643, 653-54 (Tex. App. – Fort Worth 2004, no pet.).

- Murphy was represented as a person who managed successful investment funds for individuals and managed mutual funds;
- Appellees tried to tell the court that a book and articles about Murphy told of some of the more sordid and revealing true facts about Murphy, but appellees did not previously provide that book and those articles to Reynolds. Reynolds knew nothing of these facts until April 30, 2002;
- Reynolds initially began paying for his subscription in November 1999 and renewed his subscription until around November 2001;
- Murphy said another analyst "might be headed for 'hell' because of [that analyst's] short comings as an analyst," and Murphy made frequent references to his "wall of shame" for analysts whom he claimed he had outperformed;
- Appellees purported to sell advice and expertise to Reynolds, and Reynolds paid appellees for that advice and expertise;
- Part of the subscription fee pays for the newsletter, Reynolds also received fax updates to the newsletter and access to telephone hotlines;
- Appellees promoted Murphy aggressively as a stock guru referring to him as legendary for his alleged skill in finding and selecting investments;
- Murphy eventually made statements on the hotline and in the publication admitting directly or indirectly that his earlier strategy and recommendations were fundamentally wrong; and

- Reynolds would not have subscribed to the newsletter had he been informed of Murphy's criminal history, past drug use, and poor performance as a fund manager.[10]

As explained below, none of this evidence creates a fact issue on any of appellees' grounds for summary judgment. Thus, we overrule Reynolds's eighth issue to the extent that the affidavit contains conclusory statements. But we need not determine whether the remainder of the issue should be sustained because even considering the remaining evidence that the trial court agreed was objectionable, the affidavit does not create a fact issue on Reynolds's claims. Having dispensed with Reynolds's issues related to procedural matters, we now turn to his substantive issues involving the propriety of granting the traditional motion for summary judgment.

Standard of Review

In a summary judgment case, the issue on appeal is whether the movant met its summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *S.W. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The burden of proof is on the movant, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. *S.W. Elec. Power Co.*, 73 S.W.3d at 215; *Sci. Spectrum, Inc.*, 941 at 911; *Great Am. Reserve*

[10] Other evidence appellees objected to but that we consider in our holding is detailed later in this opinion.

Ins. Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47 (Tex. 1965). Therefore, we must view the evidence and its reasonable inferences in the light most favorable to the nonmovant. *Great Am.,* 391 S.W.2d at 47.

In deciding whether there is a material fact issue precluding summary judgment, all conflicts in the evidence are disregarded and the evidence favorable to the nonmovant is accepted as true. *Harwell v. State Farm Mut. Auto. Ins. Co.,* 896 S.W.2d 170, 173 (Tex. 1995). Evidence that favors the movant's position will not be considered unless it is uncontroverted. *Great Am.,* 391 S.W.2d at 47.

The summary judgment will be affirmed only if the record establishes that the movant has conclusively proved all essential elements of the movant's cause of action or defense as a matter of law. *Clear Creek Basin,* 589 S.W.2d at 678. If the uncontroverted evidence is from an interested witness, it does nothing more than raise a fact issue unless it is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. TEX. R. CIV. P. 166a(c); *Trico Techs. Corp. v. Montiel,* 949 S.W.2d 308, 310 (Tex. 1997).

A defendant is entitled to summary judgment if the summary judgment evidence establishes, as a matter of law, that at least one element of a plaintiff's cause of action cannot be established. *Elliott-Williams Co. v. Diaz,* 9 S.W.3d 801, 803 (Tex. 1999), The defendant as movant must present summary judgment evidence that negates an element of the plaintiff's claim. *Centeq Realty, Inc. v. Siegler,* 899 S.W.2d 195, 197 (Tex, 1995). Once the defendant produces sufficient evidence to establish the right to

summary judgment, the burden shifts to the plaintiff to come forward with competent controverting evidence raising a genuine issue of material fact with regard to the element challenged by the defendant. *Id.*

First Amendment Protection – Negligence and Negligent Misrepresentation

In his first and second issues, Reynolds contends that a First Amendment case relied on by appellees, *Lowe,* does not provide authority for summary judgment on all of his claims against appellees. 472 U.S. at 181, 105 S. Ct. at 2557.[11] He contends that *Lowe* does not address the specific issues in this case and that it cannot be used to shield a publisher and author for wrongful speech. Thus, we begin with an analysis of the *Lowe* case.

The issue in *Lowe* was whether the Securities and Exchange Commission (SEC) could obtain a permanent injunction prohibiting the publication of securities newsletters containing "nonpersonalized investment advice and commentary." *Id.* at 183, 105 S. Ct. at 2559. The Court described the publications at issue in that case as follows:

> A typical issue of the Lowe Investment and Financial Letter contained general commentary about the securities and bullion markets, reviews of market indicators and investment strategies, and specific recommendations for buying, selling, or holding stocks and bullion. The newsletter advertised a "telephone hotline" over which subscribers

[11] Reynolds contends that a summary judgment based on this ground would be improper because it was raised for the first time on appeal. But appellees raised this as a general ground as to all of Reynolds's claims in their motion for summary judgment.

> could call to get current information. The number of subscribers to the newsletter ranged from 3,000 to 19,000. It was advertised as a semi-monthly publication, but only eight issues were published in . . . 15 months. . . .
>
> . . . .
>
> The Lowe Stock Advisory had only 278 paid subscribers and had published only four issues between May 1981 and its last issue in March 1982. It also analyzed and commented on the securities and bullion markets, but specialized in lower-priced stocks. Subscribers were advised that they could receive periodic letters with updated recommendations about specific securities and also could make use of the telephone hotline.

Id. at 185 & n.7, 105 S. Ct. at 2560 & n.7. The Supreme Court held that the newsletter was a bona fide publication of general circulation. Thus, it was not an "investment adviser" subject to federal regulation, and the government could not impose a prior restraint on its publication. *Id.* at 211, 105 S. Ct. at 2573.

We agree that *Lowe* is not directly on point. This case does not involve an attempt by a governmental entity to restrain speech. It concerns a private litigant's attempt to impose liability on a publisher and author. In addition, the First Amendment does not protect fraudulent or deceptive speech, *see, e.g.*, *Illinois v. Telemarketing Assocs.*, 538 U.S. 600, 612, 123 S. Ct. 1829, 1836 (2003), nor does it give one the right to breach a contract or make false warranties. *R.A.V. v. City of St Paul*, 505 U.S. 377, 420, 112 S. Ct. 2538, 2563 (1992) (Stevens, J., concurring). Thus, summary judgment would not have been proper on First Amendment grounds as to Reynolds's breach of contract,

fraud and misrepresentation, and DTPA claims. We have found no Texas authority construing *Lowe,* nor have we found any Texas case in which a subscriber to or reader of a publication sued the publication and its author based on nondefamatory content contained within the publication. But since *Lowe* was decided, two cases in other jurisdictions have explored whether publishers[12] of similar newsletters could be liable to private litigants for negligent investment "advice" given in a similar format. Those cases held that subscription newsletters similar to the one at issue here could not be held liable for negligence and negligent misrepresentation. *See Ginsburg,* 915 F. Supp. at 739-40; *Daniel v. Dow Jones & Co.,* 520 N.Y.S.2d 334, 336-40 (N.Y. Civ. Ct. 1987).

The court in *Ginsburg* granted the motion to dismiss of the defendants, the author and publisher of an investment newsletter. 915 F. Supp. at 734, 740. The plaintiff had sued the defendants because he relied on investment advice contained in the newsletter that turned out to be based on inaccurate assumptions, which the author later admitted in the newsletter. *Id.* at 734. In determining that Ginsburg's claims for negligent misrepresentation should be dismissed, the court noted that "[t]he publication is offered to the general public and the information provided in the publication is of a general nature, that is, it is not specifically tailored to [the] financial situation of any individual subscriber." *Id.* at 739. The court held that the newsletter, which was similar to the newsletter at issue here, was "subject to the same protection under the First

[12] The *Ginsburg* case also addressed the potential liability of the author of such a newsletter, *Ginsburg v. Agora, Inc.,* 915 F. Supp. 733, 733-40 (D. Md. 1995).

Amendment as any other publication." *Id.* Based on First Amendment concerns and concerns of unlimited liability because of the scope of publication of such newsletters,[13] the court held that Ginsburg's negligent misrepresentation claims should be dismissed. *Id.* at 738-40.

In *Daniel,* the plaintiff subscribed to an online news service accessible via access codes and passwords. 520 N.Y.S.2d at 335. The plaintiff claimed that the service negligently published a news story that was false and misleading because it omitted a material fact. *Id.* The court granted the defendant's motion to dismiss the cause of action, holding that the relationship of the parties was "functionally identical to that of a purchaser of a newspaper" and consequently there was no special relationship between the parties upon which to impose liability for negligent misrepresentation.[14] *Id.* at 336-38. The court also held that the news service was entitled to the same First Amendment protection as newspapers, which precludes liability for nondefamatory, negligently untruthful news. *Id.* at 339.

---

[13] The court relied on the holding in the *Daniel* case as well as *Gutter v. Dow Jones, Inc.,* 490 N.E.2d 898 (1986).

[14] The court held that the plaintiff and defendants did not have the type of special relationship contemplated by section 552 of the Restatement (Second) of Torts. *Id.* at 336-38. Section 552 of the Restatement (Second) of Torts has been adopted by the Texas Supreme Court. *Fed. Land Bank Assoc. of Tyler v. Sloane,* 825 S.W.2d 439, 442 (Tex. 1991). "Under section 552(2), liability is limited to loss suffered; . . . by the person or one of a limited group of persons for whose benefit and guidance [one] intends to supply the information or knows that the recipient intends to supply it. . . . " *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests,* 991 S.W.2d 787, 794 (Tex. 1999).

We agree with the analysis and holdings of these cases. If the summary judgment evidence shows that appellees authored and published an investment newsletter of general circulation, similar to those at issue in *Lowe* and *Ginsburg,* then appellees are entitled to First Amendment protection from Reynolds's negligence and negligent misrepresentation claims.

Appellees' summary judgment evidence includes affidavits from Murphy and David Bishop, Senior Vice President of Phillips. In his affidavit, Bishop avers that

6. Beginning in January 1999 and continuing each month since then through the present time, the *[Technology Investing]* Newsletter was prepared by Murphy and his staff and provided to Phillips which, in turn, published it and sent copies to Newsletter subscribers every month.

7. Murphy also prepared supplements to the monthly Newsletter for distribution by Phillips called Flash Bulletins and hotline updates.

8. The Newsletter is available to the public and can be obtained for an annual subscription price.

. . . .

10. Subscriptions to the newsletter were advertised in a free report (the "Free Report"). . . . The Free Report was advertised in a separate advertisement (the "Advertisement"). . . . In 1999, the Advertisement was sent to approximately 1,000,000 people. The Free Report advertises a subscription to the Newsletter, which includes receiving the Newsletter and special reports. . . .

. . . .

16. Reynolds'[s] subscriptions to the Newsletter, like all other subscriptions to the Newsletter, included receiving the Newsletter and supplemental information via Flash Bulletins by fax or e-mail and access to Internet hotline updates by e-mail, fax or a recorded telephone message.

. . . .

19. Reynolds received and/or had access to the same Newsletters, Flash Bulletins and hotline updates that were sent or made available to every subscriber of the Newsletter.

. . . .

29. Phillips has no knowledge of Reynolds'[s] individual, personalized financial conditions or any other personal matter of Reynolds.

Reynolds avers in his affidavit that the newsletter, as supplemented with faxed updates and access to a telephone hotline, is

> much different from the investment information in a newspaper or magazine, like the New York Times, the Fort Worth Star Telegram or U.S. News. . . . The New York Times and the Fort Worth Star-Telegram are regular newspapers. They can both be bought freely at newsstands in many places, including street corners, stores and even at airports. The Murphy Technology Investing Newsletter cannot be purchased at any of these types of locations. . . . The only way to get access to the Murphy TI Newsletter is to buy a subscription. . . . The newsletter informs the subscribers that it is not supposed to be shown to anyone who is not a subscriber. It can also be accessed on line; but again it is not supposed to be

> shown to anyone who is not a subscriber. In order to access it on line one must have an access code. The code is changed frequently. The subscription also allows a series of telephone access hotline updates. To access . . . Hotlines for the phone updates, one must first call a phone number, and then use a special access code. Again, the code is changed often.

According to Reynolds's affidavit, the purpose of the access code is to prevent nonsubscribers from accessing the hotline. Reynolds also avers that the fax updates are limited to subscribers and are not supposed to be shared with anyone else. Reynolds further avers that "[b]y contrast, the newspapers and U.S. News do not offer subscribers Hotlines or Flash Bulletins. The purchased information can be shared freely and without restriction." According to his affidavit, these types of publications are available at public libraries, but *Technology Investing* is not.

We hold that the summary judgment evidence established as a matter of law that *Technology Investing*, like the newsletters at issue in *Lowe* and *Ginsburg*, "is offered to the general public and the information provided in the publication is of a general nature, that is, it is not specifically tailored to [the] financial situation of any individual subscriber." *Ginsburg*, 915 F. Supp. at 739. That the newsletter was available only to subscribers, was supplemented by hotline access and "Flash Bulletins," and is not as widely published as many well-known newspapers does not change the general nature of the publication. The focus in *Lowe* was not the number of subscribers to a particular publication but the generalized nature of content of the publication. *Lowe*, 472 U.S. at 208, 105 S. Ct. at 2572. Here, there is no evidence that the pool of potential subscribers was limited only to a certain group or that any of

the advice contained in the newsletter, flash bulletins, or hotline updates was specifically tailored to the financial condition or other circumstances of any individual subscriber. To the contrary, the issues of the newsletter included in the summary judgment evidence show that general advice was given. Accordingly, the trial court did not err by granting summary judgment on First Amendment grounds on Reynolds's negligence and negligent misrepresentation claims.[15] We overrule Reynolds's first and second issues.

Because summary judgment would not have been proper on First Amendment grounds as to Reynolds's breach of contract, fraud and misrepresentation, and DTPA claims, we must examine the other summary judgment grounds asserted by appellees with respect to those claims.

Breach of Contract

Appellees contend that they are entitled to summary judgment as a matter of law on Reynolds's breach of contract claim because the evidence shows that they complied with the only agreement between the parties – to supply an investment newsletter, Appellees presented.

---

[15] Accordingly, summary judgment was also proper on Reynolds's negligence per se claim. *See Zavala v. Trujillo*, 883 S.W.2d 242, 246 (Tex. App. – El Paso 1994, writ denied) (holding that "negligence per se is not a cause of action separate and independent from a common law negligence cause of action. Negligence per se is merely one method of **proving**, through proof of an unexcused violation of a penal statute designed to protect the class of persons to which the injured party belongs, the breach of duty required in any negligence cause of action, establishing negligence as a matter of law" (citation and footnote omitted)).

evidence showing that they sent Reynolds issues of the newsletter in accordance with his subscription. Reynolds does not claim that he did not receive the newsletter as promised. Instead, he complains about the quality of the advice in the newsletter. He claims that he and appellees agreed that appellees would provide him with expert advice and they did not.[16]

Specifically, Reynolds contends (1) that Murphy promised his subscribers that if they followed his advice, they would make money and (2) that Murphy did not give his best advice; therefore, he failed to meet his contractual obligations. Reynolds points to evidence that

> Murphy advised *Technology Investing Newsletter* subscribers to "hold" onto Microsoft anticipating a growth value;[17] . . . and, at the same time provided advice to subscribers to a different service to sell their Microsoft stock anticipating a drop in value. . . . Reynolds followed the advice to hold Microsoft, having never received Murphy's advice to sell it. . . . As a result he lost money in that time period as his shares lost value.

---

[16] Some of the newsletters appellees presented as summary judgment evidence contain a one-sentence disclaimer in small type, which states, "Michael Murphy's Technology Investing bases its recommendations and forecasts on analytical techniques and sources found to be reliable in the past, but future accuracy and profitable results cannot be guaranteed." The disclaimer is located at the bottom of the page in the middle of other information about the newsletter, such as the date of the copyright and instructions for making address changes. The disclaimer is not bolded, italicized, or in any other way set apart from the other information, nor is it included in the body of the newsletter.

[17] Reynolds does not specify whether he bought Microsoft stock initially in reliance on the advice in *Technology Investing*, only that he did not sell it when the price dropped in reliance on Murphy's advice.

Appellees attached to their summary judgment motion a copy of the initial mailing Reynolds received and a copy of the free report that he ordered as solicited in the mailing. A review of those mailings shows that much of the so-called promises are puffery.[18] For example, the newsletter states, "And for the past years, I've made money for other people – people like you. . . . " It also claims that Murphy's method is "[t]he safest possible way to invest in the future," and that it "can help you invest in the future so that you multiply your wealth up to *five times* over the next 10 years."[19] None of these statements makes any specific promises, however.

Towards the end of the free report is a list entitled, "Besides making you rich, what can I do for you?" Among the items listed are "**I will tell you what you're not being told** about what's really going on in technology stocks," "**I will give you the safest way to invest** in very high growth companies," and "**I will give you the confidence to invest in things you understand**." Reynolds does not allege that appellees broke any of these specific promises. In the same list is an item stating, "**But I cannot give you overnight fortunes** . . . our perspective is long term."

---

[18] "Puffery" is an expression of opinion by a seller not made as a representation of fact. *Dowling v. NADW Mktg., Inc.*, 631 S.W.2d 726, 729 (Tex. 1982).

[19] Other examples from the free report are, "If you are on the right side of this revolution your investments will ride high indeed over the next several months," "You don't need to guess how to make a fortune from the new 'invisible computer' revolution . . . because I will tell you exactly how to do it," and "I would like the opportunity to guide you through this wonderful feast, and give you a way to savor . . . **the riches of the future, today**."

The only specific example of bad advice that Reynolds alleges is the different advice given about Microsoft stock. Attached to his summary judgment response are copies of pages from the August 2000 *Overpriced Stock Service*, which states at the beginning, "WARNING! SUBSTANTIAL SHORT SELLING IS FOR PROFESSIONALS AND SOPHISTICATED INDIVIDUAL INVESTORS ONLY. START SMALL! DIVERSIFY AND SET FIRM STOP LOSS POINTS. PLEASE USE DISCRETION IN DISCUSSING SHORT SALE IDEAS WITH THE PRESS OR NONSUBSCRIBERS." It further notes, "Let us explain exactly why we turned short-term negative on the technology stocks and recommended several trading shorts on the Hotline." It later states that "although we like many of these stocks long term, the money directly ahead looks to us to be on the short side."

As evidence that different advice was given in the August 2000 issue of *Technology Investing*, Reynolds points us to an exhibit attached as evidence to his motion for continuance. But this evidence does not show that the advice in the *Overpriced Stock Service* was any better or worse than the advice given in the *Technology Investing* newsletter. In fact, the advice appears to be almost identical. An excerpt from that issue is as follows:

> I want you to sell EMC [a different company's stock] . . . I am moving all of our other stocks [including Microsoft] to a "hold" until it looks as though we're nearing the bottom of the slump, I will tell you immediately on the Hotline . . . as soon as it's safe to resume buying. Long-term investors don't have to sell any other *Technology Investing* recommendations – they will be higher by year's end or early in 2001 as business comes back strongly in the fourth quarter. Shorter-term

> investors with taxable gains also shouldn't sell anything else. . . .
>
> However, shorter-term investors who can offset realized gains and losses, or those who have tax-free accounts, may want to lock in your gains and take some money off the table that would be available to reinvest at the lower prices I see coming. The most vulnerable of our stocks probably are . . . MSFT [defined earlier as Microsoft]. If you are going to take some short-term profits, those would be the stocks to trade on any up days during the slump.

Assuming Murphy is the author of the *Overpriced Stock Service*, which we find no evidence of, this evidence does not raise a fact issue on whether appellees breached any promises to Reynolds. The two publications appear to have exactly the same advice with respect to short-selling Microsoft stock. The information regarding holding Microsoft stock was contained in the *Technology Investing* newsletter but not the *Overpriced Stock Service*; however, the evidence shows that the *Overpriced Stock Service* was geared toward short-selling, and the *Technology Investing* newsletter was geared toward long-term gains. Because Reynolds did not present evidence raising a fact issue as to whether appellees breached any agreement with him, we hold that appellees were entitled to summary judgment on Reynolds's breach of contract claim.

Fraud and Misrepresentation

Reynolds further contends that he raised a fact issue as to whether appellees engaged in fraud and misrepresentation by failing to disclose that Murphy has a prior criminal record and a past history of drug use and by

misrepresenting Murphy's qualifications and experience. Reynolds alleges that

> on April 30, 2002, [he] learned for the first time . . . the facts that Murphy had undergone a mind altering experience after he had taken LSD in the [1960s] and that, afterward, Murphy had robbed a bank when he fell on hard times and that Murphy was convicted for that crime of bank robbery in a federal court.

Reynolds also alleged that he learned Murphy had robbed more than one bank and that he had used a pistol in the commission of the offenses. It was as a result of these discoveries, Reynolds alleges, that he realized Murphy and Phillips were perpetrating a scam.

Appellees attached to their summary judgment motion an affidavit from Murphy, in which he averred that in 1966 he was convicted of "federal crimes which could commonly be called bank robbery" and that "President Nixon pardoned [him] of those crimes." A copy of the pardon is also attached to the motion. He also averred that he has disclosed these matters in "various published articles" and in one of his books. Murphy also avers that in the 1960s he "twice used morning glory seeds, an LSD analogue, before LSD was made illegal."

A person commits fraud if he (1) makes a false, material misrepresentation (2) that he either knows to be false or asserts recklessly without knowledge of its truth (3) with the intent that it be acted upon, (4) and the person to whom the misrepresentation is made acts in reliance upon it (5) and is injured as a result. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47-48 (Tex. 1998) (op. on reh'g); *Miller v. Kennedy &*

Minshew, Prof'l Corp., 142 S.W.3d 325, 345 (Tex. App. – Fort Worth 2003, pet. denied), A misrepresentation may consist of the concealment or nondisclosure of a material fact when there is a duty to disclose. *Custom Leasing, Inc. v. Tex. Bank & Trust Co.*, 516 S.W.2d 138, 142 (Tex. 1974); *Miller*, 142 S.W.3d at 345. The duty to disclose arises when one party knows that the other party is ignorant of the true facts and does not have an equal opportunity to discover the truth. *Miller*, 142 S.W.3d at 345. A fact is material if it would likely affect the conduct of a reasonable person concerning the transaction in question. *Custom Leasing*, 516 S.W.2d at 142; *Miller*, 142 S.W.3d at 345.

As stated by appellees, "[t]he issue in this case is whether a reasonable person would decide to subscribe to a newsletter based on the personal history of the author from some 30 years ago." Appellees contend that as a matter of law, Murphy's 1966 convictions and his use of morning glory seeds twice in the 1960s are not material facts that, if known, would cause a reasonable person to refrain from subscribing to his newsletter. They point to a federal regulation governing investment advisers that requires disclosure only of material facts with respect to certain matters. 17 C.F.R. § 275.206(4)-4(a) (2004). That rule also creates a rebuttable presumption that a "legal or disciplinary event" is "material to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients" for only ten years from the time of the event if the event was not "subsequently reversed, suspended, or vacated." *Id.* § 275.206(4)-4(b) (2004) Appellees claim that if Murphy were subject to the regulations and presumably higher standards governing an investment

adviser under federal law,[20] then he would be entitled to a rebuttable presumption that his past history from the 1960s is not material and thus, cannot support a claim for fraud and misrepresentation for failure to disclose. Appellees argue that the fact that a highly-regulated investment adviser is subject to such a rebuttable presumption is evidence that Murphy's past history is not material.

We agree that under these facts as shown in the summary judgment record, Reynolds has not raised a fact issue as to the materiality of Murphy's two episodes of drug use and almost forty-year-old criminal convictions. Both the drug use and bank robberies are far-removed in time from Murphy's current investment-related activities. There is no evidence of any drug use or criminal activity since that time. Additionally, Murphy received a presidential pardon for the criminal convictions. Finally, Reynolds has not brought forward any evidence linking these forty-year-old events to Murphy's performance or the quality of his investment advice. Appellees presented summary judgment evidence that Murphy has been a stock analyst since at least the early 1970s and has been praised for his work in that time.[21] Although Reynolds presented evidence

---

[20] Because we have determined that in his capacity as author of the newsletter Murphy did not act as an "investment adviser" for purposes of the Investment Advisers Act, section 275.206(4)-4(b) does not control this case. *See supra* pages 23-24; *Lowe*, 472 U.S. at 211, 105 S. Ct. at 2573.

[21] Appellees attached as summary judgment evidence an excerpt from a book entitled *Wall Street's Picks for 1997* by Kirk Kazanjian. Murphy's name is listed under the heading "Includes Expert Recommendations From." In a page from the book, Murphy was described as "the man many regard as America's top technology guru." Appellees also attached a copy of a purported *Nation's Business* article dated May 1993 entitled *Picking the high-tech winners*. That article states that

(Continued on following page)

that two technology funds Murphy managed himself were poor performers, there is no evidence that this poor performance was related to Murphy's past history. Even if Murphy did give bad advice to Reynolds, there is no evidence linking that advice to Murphy's past episodes of drug use and criminal activity, Thus, we conclude that Reynolds failed to raise a fact issue as to the materiality of the information that he claims appellees had a duty to disclose.

Reynolds further alleges that appellees represented Murphy's "talents and skills in an untrue light." According to Reynolds, appellees "held Murphy out as an 'expert,' a 'guru,' yet at the same time withheld information that might lead people to question his judgment. The fact that he committed armed robbery in his salad days,[22] used drugs, *and managed poorly performing funds.*" [Emphasis added.]

As we have already discussed, appellees proved as a matter of law that Murphy's past indiscretions are not material to his current performance as a stock analyst. But appellees moved for summary judgment on Reynolds's fraud and misrepresentation claims only with respect to the nondisclosure of Murphy's past history. They did not move for summary judgment as to Reynolds's allegation that appellees misrepresented Murphy's "talents and

---

Murphy is "a near-legend in . . . Silicon Valley for his stock-picking prowess." The article also says that Murphy is the editor of California Technology Stock Letter, "whose model portfolio ranked fifth best among 77 newsletters tracked by Hulbert Financial Digest."

[22] Defined by Webster's Dictionary as "days of youthful inexperience or indiscretion." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2002 (3d ed. 2002).

skills." A trial court cannot grant summary judgment except on the grounds expressly presented in the motion. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002); *Sci. Spectrum, Inc.*, 941 S.W.2d at 912. Thus, a traditional summary judgment would not have been proper on this ground. Moreover, appellees' no-evidence summary judgment was also premised only on "the non-disclosure of Murphy's personal history." Thus, a no-evidence summary judgment would not have been proper on this ground either. *Hinkle v. Adams*, 74 S.W.3d 189, 193 (Tex. App. – Texarkana 2002, no pet.).

Accordingly, we hold that the trial court did not err by granting summary judgment for appellees on Reynolds's fraud and misrepresentation claims with respect to the nondisclosure of Murphy's past drug use and criminal history. But we further hold that because appellees did not move for summary judgment as to whether appellees misrepresented Murphy's "talents and skills," they were not entitled to either a traditional or no-evidence summary judgment on that particular claim.

Violation of DTPA

Appellees moved for summary judgment on five grounds as to Reynolds's DTPA claims. We turn first to appellees' contention that no statements of appellees support a DTPA claim because it is dispositive. *See* TEX. R. APP. P. 47.1. In his second amended petition, Reynolds claimed that appellees made the following misrepresentations:

- Murphy had special skill and expertise in the field of investing and more especially technology investments;

- Murphy was an expert in technology investing with great experience and expertise;
- Murphy created an investment methodology based on highly reliable principles and that those who invested in accordance with his philosophy would realize great returns on investments. The growth flow method developed by Murphy was proven;
- Murphy is an investment adviser with twenty years of experience who carefully and personally researched companies before he gave advice; Murphy would safely guide investors so they could invest and make profits safely, and he had special knowledge and expertise that enabled him to do this;
- Murphy was a person who ran investment funds and even managed private investment portfolios; and
- Murphy gave constant, strong, equivocal assurances that the market would rebound and go even higher than ever and investors should maintain and not sell his recommended core holdings.

Reynolds also claims that appellees violated the DTPA by failing to disclose Murphy's two episodes of drug use and his past criminal history.

To prove his DTPA claims, Reynolds must show that appellees engaged in a false, misleading, or deceptive act or practice enumerated under section 17.46(b) of the DTPA. TEX. BUS. & COM. CODE ANN. § 17.46(b); *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995); *Chandler v. Gene Messer Ford, Inc.*, 81 S.W.3d 493, 501 (Tex. App. – Eastland 2002, pet. denied). Reynolds alleges specifically that these alleged misrepresentations violate the following subsections of 17.46(b):

> (b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive

acts or practices" includes, but is not limited to, the following acts:

. . . .

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;

. . . .

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) disparaging the goods, services, or business of another by false or misleading representation of facts;

. . . .

(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

. . . .

(24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

TEX. BUS. & COM. CODE ANN. § 17.46(b)(5), (7), (8), (12), (24).

We have already determined that appellees showed that the information about Murphy's past history is not material as a matter of law. Thus, it cannot support a claim under section 17.46(b)(24). *See, e.g. Century 21 Real Estate Corp. v. Hometown Real Estate Co.*, 890 S.W.2d 118, 125 (Tex. App. – Texarkana 1994, writ denied), Thus, we will review whether appellees were entitled to summary judgment for alleged violations of sections (5), (7), (8), and (12).

Reynolds's claims under section 17.46(b)(5), (7), and (12) relate to his claims that appellees misrepresented Murphy's skill and expertise as a stock analyst. Appellees attached as summary judgment evidence excerpts from third party books and articles including Murphy in a list of experts, describing him as "the man many regard as America's top technology guru," and a "near-legend in . . . Silicon Valley for his stock-picking prowess." One article says Murphy's model portfolio ranked fifth best among 77 newsletters tracked by Hulbert Financial Digest. *See supra* page 32, n. 21, Appellees' summary judgment evidence also references the fact that Murphy has been involved in stock analysis in some form or fashion since the late 1960s.

We have discussed previously most of the evidence Reynolds points to as raising a fact issue on his claims, specifically the advice given in the *Overpriced Stock Service* about Microsoft and Murphy's past history. Reynolds also attached to his summary judgment other evidence that he claims shows Murphy is in fact a failure at analyzing and picking tech stocks, even though he claims he is a success. This evidence consists of a copy of an article purporting to be from TheStreet.com dated

February 20, 2002.[23] Part of this article is entitled "The Definition of Chutzpah":

> There's a fellow named Michael Murphy who, despite a truly dismal record as a fund manager, keeps spamming investors about his latest picks.
>
> Murphy's emails, replete with grammatical and spelling errors, urge recipients to sign up for a free trial of his Technology Investing newsletter, I'll refrain from linking to Murphy's site, where you'll find a biography touting him as "America's premier technology stock analyst" and former head of an unnamed software company. He's the author of every Investor's Guide to High Tech Stocks and Mutual Funds and pens two other newsletters, The California Technology Stock Letter and Biotech Investing. Murphy hadn't returned a call seeking comment as of Wednesday afternoon.
>
> On his site, Murphy, a Harvard grad who's no stranger to the investment conference circuit, touts a 66.4% cumulative return since starting his newsletter in late 1998, though no specific dates are provided on his bio page. That looks good vs. the Nasdaq Composite, but it doesn't really match up with the returns of his two tech funds, two of the wormiest apples in that ravaged bin.
>
> The Monterey Murphy New World Technology fund, which he's run since its 1993 launch,

[23] Reynolds does not reference this evidence in his briefs; however, we will nevertheless discuss it as part of our review of the summary judgment evidence.

> averages a stunning 20% annual loss over the past five years, compared with a 6% annual gain for its average peer. That's dead last among all tech funds, according to Chicago research house Morningstar.
>
> The Monterey Murphy New World Core Technology fund, which lives in the convertible bond fund category, has amassed an equally stunning record. Murphy started running the fund in 1996, and it averages an annual 7.5% loss over the past five years.
>
> Adding insult to injury, both funds carry a 1.99% annual expense ratio, well above their average peer's 1.73%. A subscription to this guru's newsletter costs $195 per year, though it's only $375 for two years.
>
> What a bargain.

But appellees' summary judgment evidence contains a copy of the March 2000 issue of *Technology Investing*, in which Murphy states,

> The mutual funds I manage are aggressive, and I raised about 50% cash at the end of 1999. (I didn't advise you to do this since we have a more conservative, long-term approach in *Technology Investing*.) But I've now put most of that money back to work as individual stocks came down, and I want you to do the same.

The issues of *Technology Investing* relied on by both appellees and Reynolds consistently emphasize the long-term investment approach described in that publication as opposed to more aggressive or short-term methods advocated by Murphy in different contexts, including, apparently, the investment funds he manages. We hold that

Reynolds did not raise a fact issue as to his claims under section 17.46(b)(5) and (12).

Although the poor performance records of Murphy's investment funds cited in the article are over a relatively long-term period, we do not believe this raises a fact issue under section 17.46(b)(7) because the newsletter clearly indicates that the investment funds Murphy managed were separate from the investments recommended in *Technology Investing* and involved a different strategy, But even if this evidence raises a fact issue as to whether Murphy misrepresented his experience and expertise in picking investments, it does not raise a fact issue as to appellees' liability under section 17.46(b)(7). Appellees also moved for summary judgment on Reynolds's DTPA claims on the ground that Reynolds could net prove causation because he admits he did not follow Murphy's advice to "hold" the recommended stocks long-term; thus, Reynolds's losses were caused by his decision to sell his stocks against Murphy's advice rather than any representations about Murphy's stock-picking prowess. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 2002) (DTPA cause of action may be maintained when deceptive act a "producing cause" of economic or mental anguish damages); *Brown v. Bank of Galveston, Nat'l Assoc.*, 963 S.W.2d 511, 514 (Tex. 1998) ("Producing cause requires that the acts be both a cause-in-fact and a 'substantial factor' in causing the injuries."). We agree and hold that Reynolds failed to raise a fact issue under section 17.46(b)(7).

We further hold that Reynolds did not raise a fact issue on his claim, under section 17.46(b)(8). That section applies only to misrepresentations of fact, not opinion. *See Tweedell v. Hochheim Prairie Farm Mut. Ins. Ass'n*, 1 S.W.3d 304, 309 n.10 (Tex. App. – Corpus Christi 1999, no

pet.). The statements Reynolds attributes to Murphy regarding other analysts – that one analyst was headed for hell because of his stock picks and that he had a "wall of shame" for analysts he claimed were poor performers – are statements of opinion, not fact. Thus, Reynolds's summary judgment evidence does not raise a fact issue on his section 17.46(b)(8) claim.

Accordingly, we overrule Reynolds's sixth issue as to his fraud and misrepresentation claims based on nondisclosure and his negligence, negligent misrepresentation, breach of contract, and DTPA claims. We sustain his sixth issue as to his fraud and misrepresentation claims based on the allegation that appellees represented Murphy's talents and skills in an untrue light.

Conclusion

Having determined that appellees were entitled to summary judgment on all of Reynolds's claims except his claim that appellees engaged in fraud and misrepresentation by representing Murphy's talents and skills in an untrue light, we affirm the trial court's judgment except as to that claim. We reverse and remand the claim that appellees engaged in fraud and misrepresentation by representing Murphy's talents and skills in an untrue light for further proceedings consistent with this opinion.

/s/ Terrie Livingston
TERRIE LIVINGSTON
JUSTICE

PANEL B: LIVINGSTON, GARDNER, and MCCOY, JJ.

DELIVERED: July 14, 2005

[SEAL]

APPENDIX B

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-03-294-CV

Ernest Reynolds, III	§	From the 17th District Court
v.	§	
Michael Murphy a/k/a and f/k/a John Michael Murphy and Phillips Investment Resources, L.L.C.	§	of Tarrant County (017-193553-02)
	§	July 14, 2005
	§	Opinion by Justice Livingston

JUDGMENT

This court has considered the record on appeal in this case and holds that there was error in part of the trial court's judgment. It is ordered that the judgment of the trial court is affirmed in part and reversed and remanded in part. We reverse that portion of the trial court's judgment regarding the claim that appellees engaged in fraud and misrepresentation by representing Murphy's talents and skills in an untrue light and remand that portion for further proceedings consistent with this opinion. The remainder of the trial court's judgment is affirmed.

It is further ordered that appellant Ernest Reynolds, III and appellees Michael Murphy a/k/a and f/k/a John Michael Murphy and Phillips Investment Resources, L.L.C. shall each pay half of the costs of this appeal, for which let execution issue.

/s/ Terrie Livingston

APPENDIX C

Cause No. 17-193553-02

ERNEST REYNOLDS III, Plaintiff, v. MICHAEL MURPHY and PHILLIPS INVESTMENT RESOURCES, L.L.C., Defendants.	§ § § § § § § § §	IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS 17th JUDICIAL DISTRICT

FINAL JUDGMENT

The Court having granted Defendants Motion for Summary Judgment by order dated Sept. 8, 2003 and, having further disposed of all parties and all claims in this case, hereby finds that a take-nothing judgment should be rendered against Plaintiff Ernest Reynolds III.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Plaintiff Ernest Reynolds III shall hereby take nothing by his claims against Defendants Michael Murphy and Phillips Investment Resources, L.L.C. (the "Defendants") and that judgment is entered against Plaintiff Ernest Reynolds III on all his claims against each and all of the Defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of court are taxed against Plaintiff Ernest Reynolds III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of the Court is directed to issue all writs and process necessary for the enforcement of this Final Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all relief not expressly granted herein is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Final Judgment finally disposes all of the parties and all claims and is appealable.

SIGNED this 8 day of September, 2003.

/s/ Fred Davis
Presiding Judge
17th District Court

APPROVED AS TO FORM:

David Fielding
State Bar No. 06974500
Nathan Schattman
State Bar No. 00791606
Laura Hallmon
State Bar No. 24004312
FIELDING, PARKER & BECK, L.L.P.
314 Main Street, Suite 300
Fort Worth, Texas 76102-7423
(817) 390-0300 (telephone)
(817) 390-0310 (fax)

ATTORNEYS FOR PLAINTIFF ERNEST REYNOLDS III

David H. Harper
State Bar No. 09025540
Amy K. Vandeloo
State Bar No. 24037632
HAYNES AND BOONE, L.L.P.
901 Main Street, Suite 3100
Dallas, Texas 75202-3789
(214) 651-5000 (telephone)
(214) 651-5940 (fas [sic])

ATTORNEY FOR DEFENDANTS MICHAEL MURPHY AND PHILLIPS INVESTMENT RESOURCES, L.L.C.

APPENDIX D

[SEAL]

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

[POSTMARK DATED Oct. 27 2006]

DATE: 10/27/2006

RE: Case No. 06-0244
COA#: 02-03-00294-CV
STYLE: ERNEST REYNOLDS III
MICHAEL MURPHY A/K/A AND F/K/A JOHN
v. MICHAEL MURPHY AND PHILLIPS INVESTMENT RESOURCES, L.L.C.

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

MAIL TO:

MR. E. DAVID FIELDING
FIELDING PARKER & HALLMON LLP
314 MAIN ST SUITE 300
FORT WORTH TX 76102-7423

APPENDIX E

NO. 06-244

IN THE

SUPREME COURT OF TEXAS

* * *

ERNEST REYNOLDS III

vs.

MICHAEL MURPHY a/k/a and f/k/a
JOHN MICHAEL MURPHY, and
PHILLIPS INVESTMENT RESOURCES, L.L.C.,

* * *

MOTION FOR REHEARING ON PETITION FOR REVIEW FROM THE SECOND COURT OF APPEALS AT FORT WORTH, TEXAS

(Filed Sept. 11, 2006)

INTRODUCTION

The court of appeals' opinion erred by cloaking Murphy, individually, with a shield of First Amendment protection when it is undisputed that he is not a publisher; and erred also by shielding Phillips Investment Resources from liability for activities other than publishing a "newsletter".

The court of appeals' opinion erred fundamentally and very dangerously by ruling that the First Amendment to the U.S. Constitution bars claims of negligence, negligence *per se*, and negligent misrepresentation in disputes between private litigants that involve only "commercial" speech. This holding badly misinterprets one U.S. Supreme court case, while in effect amending the First Amendment through "judicial review," which is beyond the power of the court of appeals. Also, the erroneous opinion

conflicts with case law precedent as announced in several U.S. Supreme Court cases.[1]

This case of first impression[2] in Texas presents issues of great importance to both Reynolds and the people of Texas. All issues are properly before this Court now.[3]

ARGUMENT

I. Michael Murphy, individually, is most definitely not entitled to any shield of First Amendment protection.

Painting with a very broad brush the Fort Worth Court concludes general advice was given in the newsletter, then *erroneously holds* as a ruling of federal constitutional law that: "*the trail court did not err by granting*

---

[1] The opinion of the Fort Worth Court conflicts with, and in effect "overrules", case law precedent from the United States Supreme Court. That opinion in this case misconstrues *Lowe v. S.E.C.*, 472 U.S. 181, 105 S.Ct. 2557, 865 L.Ed. 2d 130 (1985), and conflicts with the actual holdings and teaching of that case; and also conflicts with United States Supreme Court precedent in other cases. Those other cases include *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L.Ed.2d 1094 (1967); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed.2d 493 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974); and *Cohen v. Cowles Media Company*, 501 U.S. 663, 111 S. Ct. 2513, 115 L.Ed.2d 586 (1991). *See* T.R.A.P. 56.1(a)(4).

[2] The opinion appealed from observes, correctly, that this is a "case of first impression" [in the first line of the first sentence] for so it is in Texas.

[3] The court of appeals' first opinion did clearly recognize and hold that Reynolds had not waived any rights or points; and no party challenged that holding.

summary judgment on First Amendment grounds on Reynolds' negligence . . . claims."[4]

The Fort Worth Court bases this novel ruling on some sort of notion that the First Amendment shields a "publisher" from negligence liability; but, even if that were so, there would be no such shield of protection for Murphy, because in this case it is clear that Murphy is not a publisher. Nobody claims that he is; and all agree that the subject "newsletter" is published by Phillips. Murphy is the author, an independent contractor, and not an employee of Phillips.

Separately, it is clear that Murphy was involved in providing advice and information to Reynolds by telephone, separate and distinct from any newsletter. This was called "Hotline". Also, Murphy sometimes wrote (but did not publish) "Flash Bulletin" comments and advice which was sent to Reynolds by FAX. Neither "Hotline" nor "Flash Bulletin" were "newspapers", and nobody has ever claimed that they were. Murphy is not entitled to some new First Amendment shield from negligence liability for harm he caused to Reynolds through the "Hotline" or the "Flash Bulletin".

Finally, Murphy consistently misrepresented not only his background, but also his capabilities and accomplishments, in mailed solicitations, "Hotline" and "Flash Bulletin" communications, and comments in newsletter, thus misleading and ultimately causing harm to Reynolds (*after* this suit got filed Murphy started to post disclaimers about

---

[4] This erroneous holding is the sole basis upon which the Fort Worth Court's opinion purports to kill all negligence claims made in this instant case against all defendants.

some of these sorts of things on the internet). This involves fraud, but also involves potential negligence liability; yet the Fort Worth Court, most improperly, purports to give Murphy an absolute, total, "free pass" from negligence liability on First Amendment grounds.

This court must correct these serious errors of federal constitutional law. Murphy, individually, is not entitled to any First Amendment shield.

II. Phillips Investment Resources is not entitled to any shield of First Amendment protection for "promotional" activities which are different than publishing a "newsletter".

The Fort Worth opinion purports to grant newly created First Amendment protection to Phillips Investments which would bar negligence claims not directly related to publishing the newsletter, thus granting Phillips immunity from negligence liability in connection with promotional activities promoting Murphy. Phillips' promotions consistently misrepresented not only Murphy's background, but also his capabilities and accomplishments, thus misleading and ultimately causing harm to Reynolds. This involves fraud, but also involves potential negligence liability; yet the Fort Worth Court would give Phillips a "free pass" on First Amendment grounds. This serious error of federal constitutional law must be corrected.

II. In this case of "first impression" in Texas, the Second Court of Appeals erred by ruling, contrary to U.S. Supreme Court precedent, that the First Amendment to the U.S. Constitution bars claims of negligence, negligence per se, and negligent misrepresentation in disputes between private litigants that involve only "commercial" speech.

As shown more fully below, there is no U.S. Supreme court authority to support the novel, erroneous holding of the Fort Worth Court; but there is U.S. Supreme Court authority contrary to the Forth Worth Court holding which wrongly purports to absolutely bar negligence claims on "First Amendment" grounds. Further, the make-weight argument in the Fort Worth Court opinion about "general advice" is simply irrelevant. Maybe something like that sounded significant to the one or two lower courts whose obscure opinions seem to have "persuaded" the Fort Worth Court; but neither on this basis; nor on any other, has the U.S. Supreme Court ever created or announced any absolute "First Amendment" immunity from negligence claims. The Fort Worth Court has badly erred by purporting to do so.

To see how nonsensical the Fort Worth opinion is, please note that while it does quite correctly recognize that the First Amendment does not bar claims for breach of contract, fraud and misrepresentation, and DTPA, the same opinion then says the First Amendment bars negligence claims![5] This simply makes *no sense*. If negligence claims

[5] The Fort Worth Court does not cite any Texas authority in support of its new "rule" which has the effect of abolishing the rights of Texans to make negligence claims; but the Fort Worth Court claims that its ruling is supported by the First Amendment.

were barred, why would the other claims not be barred also? In fact, none of the claims are barred. All are claims involving generally applicable laws; and the U.S. Supreme Court has clearly held that none are barred by the First Amendment in this instant case, because that high court has held that *even the mainstream press does not enjoy any special First Amendment protection from generally applicable laws. See*: *Cohen v. Cowles media Company*, 501 U.S. 663, 669-670, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).

In the trial court Defendants Murphy and Phillips "pitched" their First Amendment argument on the premise that it had support from a U.S. Supreme Court case called *Lowe v. S.E.C.*, but it now appears that they, and (after Reynolds' Motion for Rehearing to the appeals court) the Fort Worth Court concede that this is simply not so. Indicating now that *Lowe* is not really on point, the Fort Worth Court still appears to misconstrue it on the basis of what that court seems to think to be *Lowe* inspired authority from a couple of obscure, factually distinct lower court cases, neither of them being Texas cases.

In making the holding, which it does not indicate has support in U.S. Supreme Court authority or in the actual text of the First Amendment, that "the trial court did not err by granting summary judgment on First Amendment grounds on Reynolds' negligence . . . claims" the Fort Worth Court erroneously made a *novel*, *revolutionary holding*, and is *creating a new rule*, which *conflicts with* ***Lowe***, and with a body of U.S. Supreme Court authority. **The serious error of the Fort Worth Court on this federal constitutional law issue must be addressed and corrected.**

In *Lowe*, the *constitutional issues* here in point were considered, and *decided in favor of Reynolds' position* in

the instant case, *by the federal second circuit* court of appeals. *S.E.C. v. Lowe*, 725 F.2nd 892, 898-902 (2nd Cir. 1984). *The U.S. Supreme Court*, which later decided the *Lowe* case solely on the basis of a federal statute not invoked or in point in the instant case, *did not attack or disturb the constitutional law rulings of the second circuit*, *see*: *Lowe v. S.E.C.*, 472 U.S. 181 (1985), and thus those constitutional rulings remain part of the law, and legal teaching, of that case.

The instant case is brought by an individual, Reynolds, and does not involve political speech or expression. This is a commercial speech case, as was *Lowe*, which by the way only addressed the application of the subject federal law to a "publisher"[6], and not to an author. *Lowe* did not hold that the First Amendment shields a publisher (or anyone else) from negligence liability; nor has the U.S. Supreme court ever so held. *See*: CHEMERINSKY at pages 1125-1127.

The Fort Worth Court opinion directly conflicts with U.S. Supreme Court cases, including *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (publisher of newspaper not immune from general laws, including negligence); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-347 (1974) (First Amendment does not bar negligence claims; *see esp.* at keynote 5); *Dun & Bradstreet v. Greenmoss Builders*, 472

---

[6] *See* Russell L. Weaver and Donald E. Lively, UNDERSTANDING THE FIRST AMENDMENT, page 104 (at footnote 60) (Lexis-Nexis – Mathew Bender 2003); *see also* Erwin Chemerinsky, CONSTITUTIONAL LAW – PRINCIPLES AND POLICIES at page 919 (footnote 114) (Aspen Publishers – 2nd Edition: 2002) (hereinafter CHEMERINSKY); *and* John E. Nowak and Ronald D. Rotunda, CONSTITUTIONAL LAW at page 1184 (footnote 7) (West Publishing Co. – 7th Edition: 2004).

U.S. 749 (1985) (where, as in this instant case, defendants sued in a state court tried to mount a First Amendment "shield" defense; the U.S. Supreme Court did not let them do so); *Cohen v. Cowles Media Company*, 501 U.S. 663, 669-670 (1991) (even mainstream press does not enjoy any special protection from generally applicable laws).[7]

Negligence law is simply part of the body of "[g]enerally applicable laws". This is clear; and nobody in this case has tried to argue to the contrary.

This case presents issues of great importance to the jurisprudence of Texas, and The United States of America, and of great importance both to Reynolds[8] and to the people of Texas[9] The serious, fundamental, dangerous, and revolutionary error of federal constitutional law in the erroneous opinion from Fort Worth must be corrected.[10]

* * *

---

[7] In *Cohen* the nation's highest court stated and held that: "Generally applicable laws do not offend the First Amendment" even if "their enforcement against the press has incidental effects on its ability to gather and report the news"; also holding that enforcement of "general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons. . . ." *Id.*

[8] Reynolds was trying to get guidance regarding retirement funds, and sustained damage and loss exceeding $1,000,000.00 due to the misconduct of Murphy, who is not a publisher, and Phillips, a publisher that also provided other services.

[9] The people of Texas will be literally without legal protection against negligence, in many situations, and left at the mercy of predators like Phillips and Murphy unless the error of the Fort Worth Court is corrected.

[10] In this case of "***first impression***" in the State of Texas, ...

APPENDIX F

NO. 06-244

IN THE

SUPREME COURT OF TEXAS

* * *

ERNEST REYNOLDS III

vs.

MICHAEL MURPHY a/k/a and f/k/a
JOHN MICHAEL MURPHY, and
PHILLIPS INVESTMENT RESOURCES, L.L.C.,

* * *

REPLY BRIEF OF PETITIONER
ON PETITION FOR REVIEW FROM THE
SECOND COURT OF APPEALS AT FORT WORTH, TEXAS

STATEMENT OF FACTS

* * *

It should also be noted, contrary to the assertions of Respondents in their briefs below ... that Petitioner Reynolds did not sell stock rather than follow sound advice, and then file a baseless suit. In fact, after learning the truth about Murphy and Phillips and their fraudulent, phony operation, Reynolds did what the law requires: he attempted to mitigate losses to his retirement savings. Had he failed to do so, Respondents would be accusing him of failure to mitigate.

SUMMARY OF THE REPLY ARGUMENT

* * *

The Fort Worth Court's OPINION contains an erroneous ruling of federal constitutional law which flies in the face of U.S. Supreme Court case law; and which, if not corrected, will "amend" the First Amendment through judicial review [on the part of the Fort Worth Court].

* * *

REPLY ARGUMENT

* * *

As noted and discussed in the PETITION FOR REVIEW, the erroneous OPINION of the Fort Worth Court in this case misconstrues *Lowe v. S.E.C.*, 472 U.S. 181, 105 S. Ct. 2557, 865 L. Ed. 2d 130 (1985), and conflicts with U.S. Supreme Court precedent in other cases.

* * *

B. FIRST AMENDMENT: THE ERROR IS VERY REAL

The Fort Worth Court erroneously held, at pages 23 and 24 of its OPINION [a full copy of which is found at Appendix 2 to the PETITION FOR REVIEW] that:

> "the trial court did not err by granting summary judgment on First Amendment grounds on Reynolds's [sic] negligence [and negligence per se] and negligent misrepresentation claims."

This is error. "ISSUE I" in the PETITION FOR REVIEW squarely attacks this error. The RESPONSE TO PETITION FOR REVIEW does not squarely address this.

The Fort Worth Court arrived at this error primarily through misinterpretation of Lowe v. S.E.C., supra, and

misplaced reliance on a couple of obscure lower court decisions based upon tortured readings of *Lowe*, as the PETITION FOR REVIEW clearly shows.

The only constitutional issue raised by Respondents in the trial court was a claim by them that *Lowe* established that the First Amendment barred the claims made by Reynolds. Now [please see RESPONSE TO PETITION FOR REVIEW at pages 7 and 8] even Respondents admit that:

> "the *Lowe* opinion does not base its holding on First Amendment grounds. . . ."

Indeed, as Respondents also now admit, and as the PETITION FOR REVIEW shows, *Lowe* was decided by the U.S. Supreme Court on purely statutory grounds, interpreting a federal statute not at all pertinent to the instant case.

As quoted above, the Fort Worth Court has erroneously held. on First Amendment grounds, and on no other basis, that:

> "the trial court did not err by granting summary judgment on First Amendment grounds on . . . negligence [and negligence per se] and negligent misrepresentation claims. . . ."

The U.S. Supreme Court did not so hold in *Lowe*, or any other case law. In fact, when *Lowe* was considered on constitutional grounds by the U.S. Second Circuit Court of Appeals, that learned court decided all of the U.S. Constitutional law points squarely against the position now argued for by Respondents, and squarely in favor of the position of Petitioner Reynolds, see *S.E.C. v. Lowe*, 725 F.2d 892 (2d Cir. 1984), and these First Amendment rulings of the Second Circuit have never been disturbed or

overruled, and are based upon a well developed body of law announced by the U.S. Supreme Court in not one, but many cases. . . .

APPENDIX G

NO. 06-244

IN THE

SUPREME COURT OF TEXAS

* * *

ERNEST REYNOLDS III

vs.

MICHAEL MURPHY a/k/a and f/k/a
JOHN MICHAEL MURPHY, and
PHILLIPS INVESTMENT RESOURCES, L.L.C.,

* * *

ON PETITION FOR REVIEW FROM THE
SECOND COURT OF APPEALS AT FORT WORTH, TEXAS

(Filed May 30, 2006)

* * *

Nature of the Case:	Civil suit between private parties in which Plaintiff, attempting to maintain personal retirement accounts, sustained significant monetary loss caused by improper conduct of Defendants (one published and marketed a service/product package including a newsletter; and the second, Murphy, was the author in an independent contractor relationship with the first Defendant). Plaintiff later sued to recover damages caused by misconduct including fraud, negligence, negligent

	misrepresentation, and negligence *per se*.
Trial Court:	The Honorable Fred W. Davis, 17th Judicial District Court of Tarrant County, Texas.
Trial Court Disposition:	Summary judgment for Defendants on entire case.
Court of Appeals:	Second Court of Appeals; Justice Livingston, joined by Justice Gardner; concurring opinion by Justice McCoy.
Court of Appeals' Disposition:	Affirmed trial court summary judgment as to Plaintiff's negligence, negligent misrepresentation and negligence *per se* claims. Reversed and remanded summary judgment as to Plaintiff's fraud and intentional misrepresentation claims.

STATEMENT OF THE CASE

In 1999, Defendants solicited Reynolds. Thus began a series of events through which he sustained serious financial damage due to their misconduct, which he did not learn about until 2002. Suit was filed 24 June 2002, and first set for trial on 1 March 2004. . . . On . . . 15 August 2003, . . . the trial court considered motions for summary judgment filed by the Defendants [here, Respondents], later granting same by letter [on 2 September 2003] and order [on 8 September 2003].

The court of appeals' first opinion was withdrawn after Petitioner [Appellant/Plaintiff, below] filed a motion for re-hearing; but the newly issued opinion contains

serious errors . . . of both federal law . . . holding that "the trial court did not err by granting summary judgment on First Amendment grounds on Reynolds' negligence [and negligence *per se*] and negligent misrepresentation claims." . . . If permitted to stand, the opinion conflicts with and "overrules" case law precedent from the United States Supreme Court. The Second of Court of Appeals opinion in this case misconstrues *Lowe v. S.E.C.*, 472 U.S. 181, 105 S. Ct. 2557, 865 L.Ed.2d 130 (1985), and conflicts with United States Supreme Court precedent in other cases.[1] . . .

STATEMENT OF FACTS

Petitioner [Reynolds] was attempting to maintain personal retirement accounts when Respondents solicited him in Texas in 1999. Respondent Murphy is a financial newsletter author from California. He is not a publisher. Respondent Phillips is a publisher. Murphy is an independent contractor, not an employee of Phillips. Phillips, domiciled in Maryland, published, marketed and sold a service/product package of investment advice including a newsletter, and facsimile and telephonic updates featuring Murphy, who was touted by both Respondents as a very knowledgeable, successful investment expert and fund manager. Petitioner, in reliance upon Respondents and their representations (1.) bought and paid for their

---

[1] Those cases include *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L.Ed.2d 1094 (1967); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed.2d 593 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974); and *Cohen v. Cowles Media Company*, 501 U.S. 663, 111 S. Ct. 2513, 115 L.Ed.2d 586 (1991).

services, including the newsletter; and (2.) then followed their advice, in reliance upon their continuing representations of expertise. In 2002, Petitioner learned that he had been fooled by Respondents through a variety of misconduct over time on a continuing basis. Petitioner sustained significant monetary loss.

Petitioner sued Respondents on 24 June 2002 in state court in Tarrant County, Texas, where Petitioner resides, seeking damages for Respondents' misconduct, which included fraud, misrepresentation, negligent misrepresentation, negligence and negligence *per se*. Venue was not challenged. No attempt was made to remove to federal court.

* * *

[O]n 15 August 2003, the court . . . heard the summary judgment motions. Respondents' argument at hearing was based largely upon a misinterpretation of *Lowe v. S.E.C.*, 472 U.S. 181, 105 S. Ct. 2557, 86 L. Ed. 2nd 130 (1985). The court's letter ruling of 2 September 2003 stated it would grant Defendants' request for summary judgment. On 8 September 2003, the trial court signed (1.) an Order granting the summary judgment as requested by Defendants, and (2.) a Final Judgment. This appeal followed.

SUMMARY OF THE ARGUMENT

The court of appeals' opinion erred by ruling that the First Amendment to the U.S. Constitution bars claims of negligence, negligence *per se*, and negligent misrepresentation in disputes between private litigants that involve only "commercial" speech. This holding badly misinterprets one U.S. Supreme Court case, while in effect

amending the First Amendment through "judicial review," which is beyond the power of the court of appeals. Also, the erroneous opinion conflicts with caselaw precedent as announced in several U.S. Supreme Court cases. This serious error of federal constitutional law in the erroneous opinion must be corrected.

* * *

ARGUMENT

* * *

I. Contrary to U.S. Supreme Court precedent, the Second Court of Appeals erred by ruling that the First Amendment to the U.S. Constitution bars claims of negligence, negligence *per se,* and negligent misrepresentation in disputes between private litigants that involve only "commercial" speech.

Though a state appellate court is not empowered to amend the U.S. Constitution,[3] exercise "judicial review" over that Constitution,[4] or overrule or directly conflict with caselaw from the U.S. Supreme Court, . . . the decision of the Second Court of Appeals improperly does these things with its novel, revolutionary holding that in this case involving only private litigants and commercial speech, and not involving prior restraint, the First Amendment bars common law claims of negligence, negligence *per se,* and negligent misrepresentation. The opinion reaches this conclusion through misinterpretation of *Lowe v. S.E.C.,* 472 U.S. 181, 105 S. Ct. 2557 (1985) (hereinafter *Lowe*)

---

[3] *See* UNITED STATES CONSTITUTION, Article V (procedure to amend).

[4] *C.f. Marbury v. Madison,* 5 U.S. 137, 2 L. Ed. 60 (1803); *and* UNITED STATES CONSTITUTION Article VI (supremacy clause).

and misplaced reliance on a couple of obscure lower court decisions based upon tortured readings of *Lowe*.[6]

The only constitutional issue raised by the Defendants in the trial court was a claim that *Lowe* established that the First Amendment barred Reynolds' claims. *Lowe* is not a First Amendment case, and the First Amendment does not bar or restrict claims against either of the Defendants. *Lowe* is not even a holding based on constitutional principles. The opinion in the Second Circuit that was being reviewed in *Lowe,* styled *S.E.C. v. Lowe,* 725 F.2d 892 (2d Cir. 1984) (hereinafter "*Securities*") had held that the Investment Advisers Act, 15 U.S.C. §80b-1 (1976) *et seq.,* required registration by publishers of newsletters as investment advisers and that the First Amendment permitted such regulation. In discussing the constitutional issue, the circuit court decided against the publisher and against any notion that the First Amendment protected a newsletter publisher from a civil suit, citing several U.S. Supreme Court cases as authority. *Id.* at 898-902. The Second Circuit held that investment newsletters involved commercial speech, *Securities* at 900-901, that commercial speech is not entitled to the full protection of the First Amendment, *id.* at 896, and that even the "publisher" of a newspaper has no special immunity from the prosecution of general laws (including common law actions for negligence such as misrepresentation). *Id.* at 899 (citing *Curtis*

---

[6] Yet, the Second Court recognizes that "*Lowe* is not directly on point," and correctly notes that the First Amendment does not bar claims for breach of contract, fraud and misrepresentation and DTPA violations as the opinion lurches to its novel holding in what it calls a "case of first impression."

Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L.Ed.2d 1094 (1967)).

Reviewing the Second Circuit's decision in *Lowe,* Justice Stevens framed the issue as whether the publisher could be permanently enjoined from publishing nonpersonalized investment advice and commentary because the publisher was not registered under the Act. He noted that the court should not decide a constitutional question if there is some other ground upon which to dispose of the case, and analyzed the statute there at issue to determine if the case could be decided on statutory grounds. *Lowe* at 472 U.S. 190, 105 S. Ct. 2563. After deciding the case solely on federal statutory grounds, not pertinent in the instant case, the Court stated at 472 U.S. 210, 105 S. Ct. 2573: "[W]e need not specifically address the constitutional question we granted certiorari to decide."

Clearly, the Supreme Court took care to decide *Lowe* so as to avoid any constitutional issue, simply deciding that a "publisher" (not an "author") did not come within the purview of the federal statute there in issue because that law said it did not apply to a "publisher."[7] From the trial court forward, *Lowe* was never about protecting an "author." Lowe was both author and publisher, but the case only was about whether a certain federal statute

---

[7] *See* Russell L. Weaver and Donald E. Lively, UNDERSTANDING THE FIRST AMENDMENT, page 104 (at footnote 60) (Lexis-Nexis – Mathew Bender 2003) (hereinafter UNDERSTANDING THE FIRST AMENDMENT); *see also* Erwin Chemerinsky, CONSTITUTIONAL LAW – PRINCIPLES AND POLICIES at page 919 (footnote 114) (Aspen Publishers – 2nd Edition: 2002) (hereinafter CHEMERINSKY); *and* John E. Nowak and Ronald D. Rotunda, CONSTITUTIONAL LAW at page 1184 (footnote 7) (West Publishing Co. – 7th Edition: 2004) (hereinafter referred to as NOWAK AND ROTUNDA).

applied to a publisher. *See SEC v. Lowe,* 556 F.Supp. 1359 (E.D.N.Y. 1983) and *Securities, supra.*[8]

Lowe does not hold that the First Amendment protects a publisher, or an author, from negligence liability. See Lowe, generally. *It does not appear that the United States Supreme Court has ever so held. See* CHERMERINSKY at pages 1125-1127 (press not exempt from law of general applicability). In *Dun & Bradstreet v. Greenmoss Builders,* 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), Dun & Bradstreet was sued and tried (and failed, ultimately) to raise a First Amendment "shield" defense. Suit was filed in a Vermont state court and resulted in a negligence verdict returned against Dun & Bradstreet. The Supreme Court affirmed the Plaintiff's verdict. *See Dun & Bradstreet.* This decision is in keeping with other authorities, as well.[9]

---

[8] The Supreme Court could not have disturbed the Second Circuit's constitutional law rulings in *Securities* without overruling its own prior cases that the Second Circuit had relied upon. There were many such rulings (*see* 725 F.2d at 898-202), including *Butts, supra,* in which Justice Harlan stated that a business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. . . .". 388 U.S. at 150, 87 S. Ct. at 1989. *Securities* also cited cases showing that the "speech" in question is "commercial speech," such as *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 564 n. 6, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), and cases showing this "speech" is subject to regulation, like *Friedman v. Rogers,* 440 U.S. 1, 99 S. Ct. 887, 59 L.Ed.2d 100 (1979) and *SEC v. Texas Gulf Sulphur,* 402 F.2d 833 (2nd Cir. 1968) *cert. den.* 394 U.S. 976 (1969). The Supreme Court did not disturb its earlier rulings when it decided *Lowe* on statutory grounds, *nor has it disturbed them since.*

[9] *See Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345-47, 94 S.Ct. 2997, 3009-10, 41 L.Ed.2d 789 (1974), NOWAK AND ROTUNDA at page 1275 (notes 38-40, and see text at that point); and *c.f. Gobin v. Globe Publishing,* 531 P.2d 76 (Kansas 1975) (First Amendment does not bar negligence suits by plaintiffs who are not "public figures").

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-347; 94 S.Ct. 2997, 3009-10, 41 L.Ed.2d 789 (1974), the Court appears to hold clearly that the First Amendment does not bar negligence claims (*see* especially the discussions at Key note 5); *see also Konigsberg v. State Bar of California*, 366 U.S. 36, 51, 81 S.Ct. 997, 1007 (1961) at footnote 10.

Even the mainstream press does not enjoy any special protection from generally applicable laws like negligence claims. In *Cohen v. Cowles Media Company*, 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991), the Court said: "Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. [E]nforcement of such general laws against the press is not subject to stricter scrutinity [sic] than would be applied to enforcement against other persons or organizations." 501 U.S. at 669-670.[10]

Further, the First Amendment fails to protect the Defendants in this case because their "speech" was commercial speech, which enjoys much less protection under the First Amendment, as a general rule, than political speech.[11] Commercial speech has been defined as "speech

---

[10] A leading treatise states: "The Supreme Court consistently has refused to find that the protection of freedom of the press entitled it to exemptions from general regulatory laws. For example, attempts by the press to receive constitutionally based exemptions to antitrust statutes, labor laws, and liability under state contract law have been expressly rejected." CHERMERINSKY at 1125.

[11] *See* CHEMERINSKY at pages 1044-1127; NOWAK & ROTUNDA at pages 1258-1261. The U.S. Supreme Court has stated that "commercial speech is linked inextricably to commercial activity." *Friedman v. Rogers* at footnote 9, 440 U.S. at 10, 99 S.Ct. at 894. Publications which do no more than "inform private economic decisions" have been held to constitute such speech. *Village of Schaumburg v.*

(Continued on following page)

which does 'no more than propose a commercial transaction,'. . . ." *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (quoting from *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, at 385, 93 S.Ct. 2553, at 2558 (1973)). Commercial speech is speech related solely to the interest of the speaker and his audience.[12] Core speech, on the other hand, is defined as speech containing "ideological expression" that is "integrally related to the exposition of thought." *See Virginia St. Bd. of Pharmacy* at 425 U.S. 748, 779 (Stewart, J. concurring).

The erroneous ruling of the court of appeals improperly deprives Reynolds of claims of negligence, negligent misrepresentation, and negligence *per se*. If permitted to stand, this erroneous ruling would improperly deprive any Texans of such claims.

* * *

Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826 (1980). Commercial speech occupies a "subordinate position in the scale of the First Amendment values." *Dun & Bradstreet*, 472 U.S. at 759, 105 S.Ct. at 2945, *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978).

[12] *See, e.g.*, opinion of Judge Hittner in *Eimann v. Soldier of Fortune Magazine, Inc.*, 680 F.Supp. 863 (S.D. Tex. 1988), *rev'd on other grounds*, 880 F.2d 830, 865 n.2 (5th Cir. 1989).

APPENDIX H

NO. 02-03-294-CV

IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS
AT FORT WORTH

****

ERNEST REYNOLDS, II, *Appellant,*

V.

MICHAEL MURPHY a/k/a and f/k/a
JOHN MICHAEL MURPHY, and PHILIPS
INVESTMENT RESOURCES, L.L.C., *Appellees.*

****

On Appeal from the 17th Judicial District Court,
Tarrant County, Texas,
The Honorable Fred Davis Presiding
Cause No. 17-193553-02

****

APPELLANT'S MOTION FOR REHEARING
AND REQUEST FOR *EN BANC* REHEARING

****

* * *

APPELLANT'S REQUEST FOR *EN BANC*
HEARING AND ORAL ARGUMENT

This is a . . . case involving First Amendment arguments. . . . Because this case will have a serious and significant impact upon all Texans trying to manage their retirement savings through the use of investments newsletters, it is of fundamental importance for this Court to make rulings that are in keeping with applicable law. Appellant strongly argues that the present opinion contains . . . legal

errors on significant points . . . which, if permitted to stand, would have the effect of (1) overruling case law from. . . The United States Supreme Court, [and] (2) unnecessarily reviewing and construing the Constitution of The United States of America. . . . It is important for this Court to correct its own errors in this case and for the Court to bring to bear all of its collective wisdom to do so. Therefore, this case merits, and requires, both *en banc* rehearing and, in connection therewith, oral argument. Appellant respectfully requests *En Banc* Rehearing and Oral Argument.

ISSUES PRESENTED FOR REVIEW

* * *

The Court of Appeals erred in concluding that the First Amendment protected Appellees from Reynolds' negligence and negligent misrepresentation claims . . . and in so doing de fact overruled prior cases from the United States Supreme Court and from Texas cases. (Op. 16-24).

* * *

First Amendment Issue (Op. 16-24)

The Opinion incorrectly holds that the First Amendment shields Defendants from Reynolds' claims for negligent misrepresentation, negligence per se, and gross negligence. . . . In so doing, the Court has, effectively, overruled case law from the Supreme Courts of the United States. . . .

The only constitutional issue raised by the Defendants in the trial court was that *Lowe v. Securities and Exchange Commission*, 472 U.S. 181, 105 S. Ct. 2557, 2570-76, 86 L. Ed. 2d 130 (1985) barred Reynolds' claims under the First

Amendment. The Opinion, while correctly observing that *Lowe* is not on point, starts down an incorrect path by calling *Lowe* a First Amendment case and then purports to follow two later cases, *Ginsburg v. Agora, Inc.*, 915 F. Supp. 733 (D. Md. 1995) and *Daniel v. Dow Jones & Co.*, 520 N.Y.S. 2d 334 (N.Y. Civ. Ct. 1987), both of which purported to follow *Lowe*, *Ginsburg* and *Daniel*, which rely upon *Lowe* as authority, cannot be valid First Amendment authority if *Lowe* is not. However, the Opinion indicates that it perceives that *Ginsburg* and *Daniel* may give Defendants "First Amendment protection from . . . negligence and negligent misrepresentation claims." (Op. 20). Thereafter, this Court erroneously holds that various negligence claims are all barred on "First Amendment grounds." (Op. 23-24)

Lowe is not a First Amendment case, and the First Amendment does not bar or restrict claims against either of the Defendants. As the Court has already noted, *Lowe* is not directly on point. *Lowe* is not even a holding based on constitutional principles. The opinion in the Second Circuit that was being reviewed in *Lowe, Securities and Exchange Commission v. Lowe*, 725 F.2d 892 (2d Cir. 1984) had held that the Investment Advisers Act, 15 U.S.C. §80b-1 (1976) et seq., required registration by publishers of newsletters as investment advisers and that the First Amendment permitted such regulation. In discussing the constitutional issue, the circuit court decided squarely against the publisher and against any notion that the First Amendment protected a newsletter publisher from a civil suit, citing U.S. Supreme Court cases as authority. Id. at 898-902. The Second Circuit held that investment newsletters involved commercial speech (*Securities* at 900-901), that commercial speech is not entitled to the full

protection of the First Amendment (*Securities* at 896), and that even the publisher of a newspaper has no special immunity from the prosecution of general laws (including common law actions for negligence such as misrepresentation) [*Securities* at 899, citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed2d 1094 (1967)].

In reviewing the Second Circuit's decision, Justice Stevens first framed the issue as being whether the publisher could be permanently enjoined from publishing nonpersonalized investment advice and commentary because the publisher was not registered under the Act. Then he noted that the court should not decide a constitutional question if there is some other ground upon which to dispose of the case. He analyzed the statute to see if the case could be decided on statutory grounds. *Lowe* at 472 U.S. 190, 105 S.Ct. 2563. After then deciding the case on statutory grounds, the Court then stated at 472 U.S. 210, 105 S.Ct. 2573: "It also follows that we need not specifically address the constitutional question we granted certiorari to decide."

Clearly, the Supreme Court took care to decide *Lowe* so as to avoid any Constitutional issue, simply deciding that a "publisher" (not an "author") did not come within the purview of the federal law there in issue because that law said it did not apply to a "publisher." *See* Russell L. Weaver and Donald E. Lively, UNDERSTANDING THE FIRST AMENDMENT, page 104 (at footnote 60) (Lexis-Nexis – Matthew Bender 2003) (hereinafter UNDERSTANDING THE FIRST AMENDMENT); *see also* Erwin Chemerinsky, CONSTITUTIONAL LAW – PRINCIPLES AND POLICIES at page 919 (footnote 114) (Aspen Publishers – 2nd Edition: 2002) (hereinafter CHEMERINSKY); *and* John E. Nowak and Ronald D.

Rotunda, CONSTITUTIONAL LAW at page 1184 (footnote 7) (West Publishing Co. – 7th Edition: 2004) (hereinafter referred to as NOWAK AND ROTUNDA). From the trial court forward, *Lowe* was never about protecting an "author". Lowe was both author and publisher, but the case only was about whether a certain statute applies to a publisher. *See SEC v. Lowe*, 556 F.Supp. 1359 (E.D.N.Y. 1983) and *Securities, supra.*

The Supreme Court could not have disturbed the Second Circuit's constitutional law rulings without overruling its own prior cases that the Second Circuit had relied upon. There were many such rulings (*see* 725 F.2d at 898-902), including *Butts, supra* in which Justice Harlan stated that a business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. . . . Id. at 150. *Securities* also cited cases showing that the "speech" in question is "commercial speech," such as *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 n. 6, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), and is subject to regulation, like *Friedman v. Rogers*, 440 U.S. (1979) and *SEC v. Texas Gulf Sulphur*, 402 F.2d 833 (2nd Cir. 1968) *cert. den.* 394 U.S. 976 (1969). The Supreme Court did not disturb its earlier rulings when it decided *Lowe* on statutory grounds, nor has it disturbed them since.

Lowe does not hold that the First Amendment protects a publisher, or an author, from negligence liability. *See Lowe.* It does not appear that the United States Supreme Court has ever so held. *See* CHEMERINSKY at pages 1125-1127 (press not exempt from law of general applicability). In *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), Dun & Bradstreet

was sued and tried (and failed, ultimately) to raise a First Amendment "shield" defense. Suit was filed in a Vermont State Court and resulted in a negligence verdict returned against Dun & Bradstreet. The Supreme Court affirmed the plaintiff's verdict. *See Dun & Bradstreet*. This decision is in keeping with other authorities, as well. *See Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345-47, 94 S.Ct. 2997, 3009-10, 41 L.Ed.2d 789 (1974), NOWAK AND ROTUNDA at page 1275 (notes 38-40, and see text at that point); and *Gobin v Globe Publishing*, 531 P2d 76 (Kansas 1975) (First Amendment does not bar negligence suits by plaintiffs who are not "public figures"). In *Gertz*, the Court appears to hold clearly that the First Amendment does not bar negligence claims (*see* especially the discussion at Key note 5); *see also Konigsberg v State Bar of California*, 366 U.S. 36, 51, 81 S.Ct. 997, 1007 (1961) at footnote 10.

The press does not enjoy any special protection from generally applicable laws like negligence claims. In *Cohen v Cowles Media Company*, 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991) the Court said: "Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. [E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." 501 U.S. at 669-670. A leading treatise states: "The Supreme Court consistently has refused to find that the protection of freedom of the press entitles it to exemptions from general regulatory laws. For example, attempts by the press to receive constitutionally based exemptions to antitrust statutes, labor laws, and liability under state

contract law have been expressly rejected." CHEMERINSKY at 1125.

Next, the First Amendment fails to protect the Defendants in this case because their "speech" was commercial speech, which enjoys much less protection under the First Amendment, as a general rule, than political speech. *See* CHEMERINSKY at pages 1044-1127; NOWAK & ROTUNDA at pages 1258-1261. Commercial speech has been defined as "speech which does 'no more than propose a commercial transaction,'. . . ." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), quoting from *Pittsburgh Press Co. v. Human Relations Comm'n,* 413 U.S. 376, at 385, 93 S.Ct. 2553, at 2558 (1973). Commercial speech is speech related solely to the interest of the speaker and his audience. *See,* e.g. opinion of Judge Hittner in *Eimann v. Soldier of Fortune Magazine, Inc.,* 680 F.Supp. 863 (S.D. Tex. 1988), *rev'd on other grounds,* 880 F.2d 830 (5th Cir.1989). Core speech, on the other hand is defined as speech containing "ideological expression" that is "integrally related to the exposition of thought." Id. at 865 n. 2, citing *Virginia State Bd. of Pharmacy* at 425 U.S. 748, 779 (Stewart, J. Concurring).

The U.S. Supreme Court has stated that "commercial speech is linked inextricably to commercial activity." *Friedman,* footnote 9, 440 U.S. at 10, 99 S.Ct. at 894. Publications which do no more than "inform private economic decisions" have been held to constitute such speech. *Village of Schaumburg v Citizens for a Better Environment,* 444 U.S. 620, 100 S.Ct. 826 (1980).

Commercial speech occupies a "subordinate position in the scale of First Amendment values." *Dun & Bradstreet,*

472 U.S. at 759, 105 S.Ct. at 2945, *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978). "Even when the cause of injury is core speech, a simple negligence action is permitted for libel and slander provided the plaintiff is not a public figure." *Eimann* at 865. *See, also, Dun & Bradstreet,* supra. In *Gertz,* the court held that even a newspaper could be sued for libel for something in a news article if the plaintiff had a legitimate claim and was not a "public figure". Judge Hittner reached the conclusion that the law does not prohibit a negligence claim in a commercial speech context when such an action is not prohibited in a core speech context. *Eimann* at 865.

* * *

APPENDIX I

NO. 02-03-294-CV

IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS
AT FORT WORTH

****

ERNEST REYNOLDS, III, Appellant,

V.

MICHAEL MURPHY a/k/a and f/k/a
JOHN MICHAEL MURPHY, and PHILLIPS
INVESTMENT RESOURCES, L.L.C., Appellees.

****

On Appeal from the 17th Judicial District Court,
Tarrant County, Texas,
The Honorable Fred Davis Presiding
Cause No. 17-193553-02

****

REPLY BRIEF OF APPELLANT

****

* * *

STATEMENT OF THE ISSUES ON REPLY

The majority of the argument and issues raised by Appellees was addressed in Reynolds' principal brief. Defendants refer to various matters outside the record, like their detailed discussion of a book they say Mr. Murphy wrote, and various inaccuracies of both fact and law. Given the restrictions on length of this Reply Brief, a comprehensive listing of these items is not practical. Instead, Reynolds has noted this, but elects in this brief, as in his first brief filed in this case before this Court, to

try to simply deal with the actual facts and issues of the cases and to continue to try to present solid discussion on law points. This Brief will focus on addressing . . . the more amorphous interpretations of the record and the law by Defendants. Each will be presented under a separate heading. Reynolds presented an exhaustive statement of facts and timeline in his principal brief.

ARGUMENT

I. The New First Amendment Arguments Raised by Defendants for the First Time on Appeal Do Not Support the Summary Judgment Awarded to Defendants.

With the cynicism of the finest French authors, Defendants spend five pages of their Brief urging this Court to find that Reynolds has waived certain challenges to their summary judgment (pages 10-15), and then immediately turn to a new First Amendment argument never presented to the trial court to try to rescue that portion of their motion. . . . For the first time on appeal, Defendants argue that neither publishers nor authors of general circulation materials owe a general duty of care to subscribers. (Defs' Brief, pp. 16-20).

The record shows the materials in question are not "general circulation materials".[1] In any event, the cases

[1] Phillips' newsletter, flash bulletin, and hotline containing Murphy's advise [sic] was not a general circulation newsletter. These services cannot be obtained at news stands or in libraries. (CR.,v. XIX, pp. 2954-56). They are only available for purchase by subscription. (CR., v. XIX, p. 2955). The hotline may only be accessed by people with current access codes. (CR., v. XIX, p. 2955). It was certainly not engaged in political speech. (*e.g.*, CR., v. V, p. 774). It gives express advice and

(Continued on following page)

newly cited by Defendants demonstrate the specious nature of Defendants' First Amendment argument. A close reading of Defendant's brief will show that none of the cases cited by Defendants actually support a summary judgment of a claim for damages by a private litigant based on the First Amendment. Conversely, numerous cases hold that even media defendants engaged in political speech are subject to possible liability despite their First Amendment rights if they wrongfully publish damaging material. *See, New York Times v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 116 L.Ed.2d 686 (1964).... The First Amendment likewise does not protect a judge from discipline for his intemperate comments to the media. *In re Davis,* 82 S.W.3d 140 (Tex.Spec.Ct. Rev. 2002). Commercial speech, such as the Defendants' may certainly be regulated because is subordinate to political speech. *See, Chairking, Inc. v. GET Mobile,* 135 SW. 3d 365 (Tex.App. – Houston [14th Dist.] 2004).[2]

---

recommendations of investment actions to its subscriber. (CR., v. V, p. 775). Reynolds is not a governmental entity seeking "prior restraint." The Defendants' failing at issue was not an innocent typographical error in "a news wire services corporate earnings report," of the type discussed by the commentators relied upon for the first time by Defendants in their Appellate Brief at 17-18 citing P. Cameron DeVore, Robert D. Stack, Steven Brody, and Bruce E.H. Johnson, *Advertising & Commercial Speech, A First Amendment Guide,* Practicing Law Institute § 10:2 (April 2003).

[2] The U.S. Supreme Court has also recognized that the First Amendment does not categorically bar the government from regulating political expression through fund raising conduct. *McConnell v. Federal Election Comm.,* ___ U.S. ___, 124 S.Ct. 619, 660-663, 157 L.Ed.2d 491 (2003). It also recently declined certiori [sic] on a commercial speech case where the Tenth Circuit held that telemarketing "no call lists" were not categorically barred by the First Amendment. *Mainstream Marketing Services, Inc.,* ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2004 WL 205134 (U.S. Oct. 4, 2004), *denying cert.,* 358 F.3d 1228 (10th Circ. 2004).

The First Amendment does not protect false and misleading representations. *See, e.g. Mother & Unborn Baby Care v. State,* 749 S.W.2d 533 (Tex.App. – Fort Worth 1988), *cert. den'd,* 490 U.S. 1090, 1085 S.Ct. 2431, 104 L.Ed.2d 988 (1988). False advertising and misleading communications, even when done by real licensed professionals, are not protected by the First Amendment. *See, Rodgers v. Commission for Lawyer Discipline,* 2004 WL 2108883 (Tex.App. – Fort Worth 2004) (23 September 2004).

* * *

Resolving the factual disputes in favor of the nonmovant, as this appellate court must do, *see Commission for Lawyer Discipline v. C.R.*, 54 S.W.3d 506, 511 (Tex.App. – Fort Worth 2001), Defendants engaged in calculated fraudulent and misleading misrepresentations of Murphy's qualifications and experience, coupled with simultaneously providing conflicting advice to different groups of subscribers. (CR., v. V, pp. 781-99; CR., v. XIII, pp. 2135-36; CR., v. XIX, pp. 2952; 2857-58). This is exactly the sort of improper and fraudulent behavior the First Amendment does not protect. *See, Illinois v. Telemarketing Assoc.,* 538 U.S. 600, 612 123 S.Ct. 1829, 155 L.Ed.2d, 93 (2003) ("protect" people against fraud."); *Rodgers v. Commission for Lawyer Discipline,* 2004 WL 2108883 (Tex.App. – Fort Worth 2004). The First Amendment is not a general license for misconduct, nor is it a bar to all civil suits arising out of any misconduct that involved some form of communication. *See, Illinois,* 538 U.S. at 612.

* * *

APPENDIX J

NO. 02-03-294-CV

IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS
AT FORT WORTH

****

ERNEST REYNOLDS, III, *Appellant*,

V.

MICHAEL MURPHY a/k/a and f/k/a
JOHN MICHAEL MURPHY, and PHILLIPS
INVESTMENT RESOURCES, L.L.C., *Appellees.*

****

On Appeal from the 17th Judicial District Court,
Tarrant County, Texas,
The Honorable Fred Davis Presiding
Cause No. 17-193553-02

****

BRIEF OF APPELLANT

****

* * *

STATEMENT OF THE FACTS

* * *

(a) Substantive Facts of the Case

Appellee Phillips markets, publishes, and sells a newsletter entitled *Technology Investing Newsletter* written by Appellee Murphy. (CR., v. V, pp. 774-75). The articles by Murphy contain his advice on how to use a pattern of investment to obtain long term profits. (CR., v. V, p. 775). This advice was purportedly based upon Murphy's new,

tested, and proven successful system. (CR., v. V, p. 793). In solicitations for this newsletter and in the articles themselves, Murphy claimed to have specialized experience, knowledge, skill and contacts that gave him expert insight into selecting the best and most profitable investments. (CR., v. V, pp. 781-99). For example, he claimed to have managed several successful funds over a 17 year period. (CR., v. V, pp. 781-82). Based on these representations, Reynolds purchased a subscription to the newsletter. (CR., v. V, pp. 806-08). In addition to the regular newsletter, Reynolds also received *Technology Investing Flash Bulletins* containing additional advice from Murphy. (CR., v. VI, pp. 868-70). Reynolds also paid for access to a "hotline updates" phone number which provided additional information. (CR., v. VI, p. 866). The newsletter was mailed monthly to Reynolds. (CR., v. V, p. 777). The newsletter is not carried in the periodical section of major libraries or sold at newstands. (CR., v. XIX, pp. 2954-56). Each issue informs subscribers that it should not be shared with non-subscribers. (CR., v. XIX, p. 2955). It can be accessed online, but to do so one must have an access code. (CR., v. XIX, p. 2955). These access codes are changed frequently. (CR., v. XIX, p. 2955). Similarly, when a subscriber calls the hotline for phone updates, he or she must enter an access code before listening to the update. (CR., v. XIX, p. 2955).

Reynolds first subscribed to the *Technology Investing Newsletter* in 1999. (CR., v. V, p. 776). He renewed and maintained his subscription through 2001.(CR., v. V, p. 808) Phillips and Murphy marketed this subscription to Reynolds by representing that Murphy had developed a new, tested and successful method or "system" for selecting the best and most profitable investments, his expertise

and contacts, as well as his prior successful management of individual investment funds and mutual funds. (CR., v. V, pp. 781-99).

It is undisputed that over the two year period from November 1999 to November 2001, Reynolds received the newsletter, flash faxes, and hotline updates in which Phillips presented Murphy's analysis of the technology section of the economy. It was presented that Murphy could, and did, analyze the companies and trends in a way that enabled him to reliably predict future developments so that profitable investments could be made. (*eg.* CR., v. V, pp. 781-99). Throughout this period Reynolds was advised to buy and hold certain "core stocks," such as Microsoft, based on Murphy's representations that Microsoft and the other "core stocks" would grow in value. (CR., v. XIX, p. 2957).

In his newsletter, fax bulletins and hotline updates Murphy would also regularly disparage the goods, services and business of other investment analysts. (CR., v. XIX, 2952). In particular, in one phone update Murphy said that an analyst named Weiss who disagreed with Murphy's analysis would be headed for "hell." (CR., v. XIX, p. 2952). This discouraged Reynolds from seeking other advice. (CR., v. XIX, p. 2952).

In 2001 Reynolds became concerned by the losses in his accounts. (CR., v. XIX, p. 2957). He sent an e-mail complaint to Phillips and Murphy raising his concerns. (CR., v. XIX, p. 2957). He never received a response. (CR., v. XIX, p. 2957).

On or about April 30, 2002, Reynolds began learning that the representations made to him concerning both Murphy's qualifications and the quality of Murphy's advice

were inaccurate. (CR., v. XIX, p. 2951). Reynolds learned that at the same time Murphy had been advising Reynolds and the other subscribers to *Technology Investment Newsletter* to buy and hold Microsoft anticipating a growth in value, he had been advising subscribers to a different newsletter called the *Overpriced Stock Service* to "sell short"[1] on Microsoft because he believed the price would go down. (CR., v. XVIII, p. 2836). Still further inquiry revealed that Phillips had concealed Murphy's true name in its material. (CR., v. XIX, p. 2950). Reynolds also learned Murphy was a convicted (albeit pardoned) felon for the offense of armed robbery and a former drug user. (CR., v. XIX, pp. 2957-58).

He also learned that Murphy's "successful" track record of managing funds was, to say the least, less than represented. For example, at the relevant times Murphy was the portfolio manager of the Murphy New World Technology Fund and the Murphy Technology Convertibles Fund. (CR., v. XIII, pp. 2135-36). Both of these funds under-performed the S&P 500 index. (CR., v. XIII, pp. 2146-53). The Murphy New World Technology Fund had an average total return of negative 4.10% for the five year period ending November 30, 2000. (CR., v. XIII, p. 2144).

As a result of relying upon and following the advice of Murphy contained in the newsletter, fax and updates of Murphy, Reynolds lost a significant amount of money.

---

[1] "Selling short" is a practice in which an investor borrows another investor's shares in order to sell them with a promise to return an equal number of shares at a set future date. A profit is made if the value of the shares decreases during the time period. That will allow sales of the shares at a higher rate and repurchase of the shares at a lower rate, the difference being the profit.

(CR., v. XIX, p. 2952). Reynolds would not have followed Murphy's advice if he had known the full details of Murphy's criminal background, his failures as an investment manager, and the fact that he gave conflicting advice to another group of subscribers to a different newsletter. (CR., v. XIX, p. 2952; pp. 2957-58).

* * *

Phillips, in fact, published a number of different newsletters with investment advice from Murphy including the aforementioned *Overpriced Stock Service*. (CR., v. XIV, pp. 2777-84) . . . the *Overpriced Stock Service* advised "selling short" Microsoft and other patterns of conflicting advice. (CR., v. XIV, pp. 2350-51).

[F]rom 1999 onwards the Defendants were involved in a marketing campaign to sell the *Technology Investing Newsletter*. . . . This marketing was done . . . to engage in trade and commerce . . . for a profit. (CR., v).

* * *

Murphy was engaged in managing a series of investment funds including the Murphy New World Funds. (CR., v. XIV, pp. 2408-10). This fund included technology funds that did not follow and in many cases acted contrary to the advice Murphy gave in the *Technology Investment Newsletter.* (CR., v. XIV, pp. 2408-10) . . . Murphy had regularly been giving investment advice in a number of newsletters. (CR., v. XIV, pp. 2300-02). Yet he is not a federally licensed investment advisor. (CR., v. IV, p. 699). This conduct violates a number of different federal regulations and guidelines, ...

[M]isrepresentations concerning Murphy's qualifications and skills were made intentionally and knowingly.

(CR., v. XIII, pp. 2035-38). [V]arious funds managed by Murphy had under-performed the S&P 500 prior to and during the period Reynolds subscribed to the newsletter. (CR., v. XIII, pp. 2146-53).

[W]hile touting Murphy to Reynolds, Phillips also failed to disclose to Reynolds . . . instances of advice Murphy was giving in other newsletters that was significantly different from and in many cases contrary to the advice given at the same time to Reynolds in *Technology Investing Newsletter.* For example, publications that the Defendants were selling for profit between November 1999 and August 2001, included the *Overpriced Stock Service,* (CR., v. XIII, pp. 1977-78), the *California Technology Stock Letter*, (CR., v. XIII, pp. 1981-83), and the *Biotech Investing Newsletter.* (CR., v. XIII, pp. 2001-05). In March, 2001, Murphy also gave out advice to others about the best way to profit in turbulent markets that was different from the advice that was being given to Reynolds and his follow [sic] subscribers (CR, v. XIII, pp. 2045-47). Murphy also was giving out conflicting advice at events called "Money Shows" in such places as Las Vegas, San Francisco and Florida. (CR., v. XIII, pp. 2045-47).

The Defendants also failed to disclose to Reynolds that while Murphy was telling Reynolds to buy and hold Microsoft in July 2000, a fund for which Murphy was "Chief Investment Officer" held a "short position" in Microsoft. (CR., v. XIII, pp. 2120-26). Nor did Murphy or Phillips inform Reynolds that from November 1999 and August 2000 various investment funds in which Murphy was involved, as "Chief Investment Officer" held "short" positions in the same stocks that Murphy's *Technology Investing Newsletter* advice sold to Reynolds identified as great "core" stocks to buy and hold forever. (CR., v. XIII,

pp. 2120-26). The Defendants did not advise or warn Reynolds that in November 1999, Murphy told an interviewer that he was seriously considering "shorting" Internet stocks (CR., v. XIII, pp. 2120-26).

* * *

SUMMARY OF THE ARGUMENT

* * *

Defendants sought summary judgment based on the theory that the First Amendment insulates publishers from any liability for its publications. (CR., v. IV, pp. 701-04). In doing so Defendants seek a radical expansion of the protection afforded by the First Amendment. Specifically Defendants seek to extend what they purport to be a holding by the U.S. Supreme Court that the Federal Government cannot engage in the prior restraint of a certain type of commercial free speech into an abolishment of any common law or statutory claim for damages in a private cause of action brought by a citizen arising out of a publisher's speech no matter how illegal, malicious, fraudulent, negligent, or tortious. Unfortunately for Defendants, the U.S. Supreme Court has already rejected the theory that the First Amendment can shield an entity from liability for fraud. Texas courts have followed this lead. Moreover, even if the case relied upon by Defendants could be misconstrued to provide blanket First Amendment protection to Phillips, a publisher, it does not extend to Murphy, who is admittedly not a publisher. Therefore, Appellees' legal argument that the First Amendment insulates them from liability is meritless.

* * *

The Defendants are not Entitled to First Amendment Protection under *Lowe*.

* * *

a. Reynolds' Claims Against Phillips are not Preempted by *Lowe*

Defendants argue that the newsletter, fax updates, and hotline products and services they sold to Reynolds are entitled to protection under the First Amendment. (Defs' MSJ p. 7, pp. 17-21, pp. 42-43) relying entirely on *Lowe v. Securities and Exchange Commission,* 472 U.S. 181, 105 S. Ct. 2557, 2570-76, 86 L. Ed. 2d 130 (1985). However, on its own terms *Lowe* does not apply to this present case, either factually or as a matter of law.

Moreover, the Supreme Court in *Lowe* did not rule that the First Amendment shielded publishers; *Lowe* simply does not reach the First Amendment argument raised by Defendants. *Lowe,* 472 U.S. at 210-11, 105 S. Ct. at 2573. In fact, the opinion concludes with: "It also follows that we need not specifically address the constitutional question we granted certiorari to decide." 472 U.S. at 211, 105 S. Ct. at 2573.

In *Lowe* the Securities and Exchange Commission (S.E.C.) sought to prevent a publishers' future publication of issues of a commercial newsletter under the Federal Investment Advisory Act, 15 U.S.C. § 80b-3, 472 U.S. at 210-11; 105 S. Ct. at 2573. The act provided an exception from its enforcement provisions for publishers of general circulation publication. 472 U.S. at 210-11, 105 S. Ct. 2573. The Court concluded that *Lowe* fell within the statutory exception. *Id.*

Nothing in *Lowe* implicitly or explicitly abolishes common law or statutory causes of action for damages arising out of illegal, malicious, fraudulent, negligent or other wise [sic] tortious misuses of speech, or establishes any constitutional protectior for publishers. Reynolds is not a governmental agency, and Reynolds did seek any prior restraint as relief. Reynolds merely sought to hold Defendants responsible for their past fraudulent statements and prior improper conduct that caused him harm. If *Lowe's* holding included a First Amendment protection as expansive as the Defendants propose then, no newspaper since 1985 could have been held liable for defamation; no merchant could be held liable under the Lanham Act for false advertising related to trademarked goods; no merchant could be held liable under the Deceptive Trade Practices Act; and no ruffians could be sued for yelling "fire" in a crowded theater.

The United States Supreme Court did not provide wrongdoers with such a blank check then; and, also has not in its more recent opinions. Indeed, although Defendants failed to inform the trial court, Justice Ginsberg writing for an unanimous court, recently rejected Defendants' reading of *Lowe*. *See, Illinois v. Telemarketing Associates,* 538 U.S. 600, 612, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003). The government, and its courts, have always had the power "to protect people against fraud." *Id, quoting, Donaldson v. Read Magazine, Inc.,* 333 U.S. 178, 68 S. Ct. 571, 92 L. Ed. 628 (1948). It is well settled that fraud, like any form of deception, is unprotected speech. *Telemarketing,* 538 U.S. at 612, 123 S. Ct. at 1836, *citing, Schneicher v. State (Town of Irvington),* 308 U.S. 147, 164, 60 S. Ct. 146, 84 L. Ed. 155 (1939). Freedom of the press does not include the right to deceive the public. *Telemarketing,*

538 U.S. at 612, 123 S.Ct. 1836 *citing Donaldson* 333 U.S. at 192, 68 S.Ct. at 598.

It also is well settled that freedom of the press does not, and never has, included a right to deceive the public. *Donaldson,* 333 U.S. at 192, 68 S.Ct. at 598. Nor does it insulate a publisher from the consequences of their exercise of free speech. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).

* * *

b. Even if *Lowe* were to Insulate Phillips, it does not Protect Murphy.

Furthermore, even if this court did expand the scope of *Lowe* to protect Phillips as a publisher from the consequences of its actions, it is undisputed through Defendants' own testimony that Murphy is not a publisher, and so clearly falls outside of *Lowe's* protection to publishers.

* * *

APPENDIX K

188 S.W.3d 252

Court of Appeals of Texas,
Fort Worth.
Ernest REYNOLDS, III, Appellant,
v.
Michael MURPHY a/k/a and f/k/a John Michael Murphy and Phillips Investment Resources, L.L.C., Appellees.
No. 2-03-294-CV.
Feb. 9, 2006.

Background: Subscriber of investment newsletter brought action against author and publisher of the newsletter, asserting claims for breach of contract, negligence, negligent misrepresentation, fraud and misrepresentation, and violations of Deceptive Trade Practices Act (DTPA). The 17th District Court, Tarrant County, *Fred Davis*, J., granted defendants summary judgment. Subscriber appealed.

Holdings: On rehearing, the Court of Appeals, *Terrie Livingston*, J., held that: . . .

as a matter of first impression, author and publisher had First Amendment protection from negligence, negligent misrepresentation, and negligence per se claims made by subscriber; . . . .

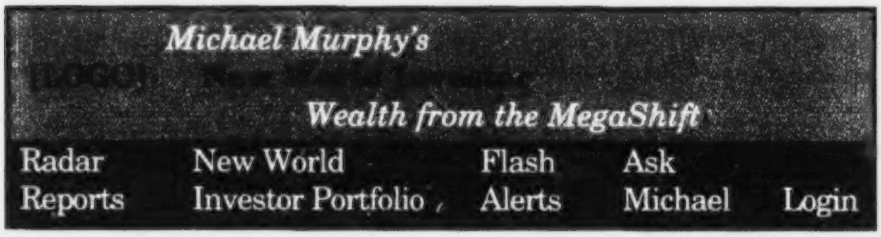
[14] KeyCite Notes

Author and publisher of investment newsletter had First Amendment protection from negligence, negligent misrepresentation, and negligence per se claims made by subscriber of newsletter who alleged he suffered damages as a result of following newsletter's advice, as newsletter was

a general circulation newsletter; though it was only available to subscribers and was not as widely published as many well-known newspapers, newsletter was offered to the general public, newsletter provided general advice, and newsletter was not specifically tailored to the financial situation of any individual subscriber. *U.S.C.A. Const.Amend. 1.*

APPENDIX L

Michael Murphy's New World Investor: Meet Michael Murphy



Printer Friendly

Sunday, January 7, 2007

BEST AVAILABLE COPY

Meet Michael Murphy

"A near legend in Silicon Valley for his stock picking prowess." – *Nation's Business*

Michael Murphy is one of the nation's leading experts in exciting technology industries. He began his career in the industry's infancy, first as a technology analyst for American Express in 1970 and later as the head of a software company.

For the last two decades Murphy has worked as in independent tech investment writer, where he has shared his stock recommendations and unique industry analysis with thousands of individual investors. His former newsletter, *Technology Investing*, was rated America's top investment newsletter in 1999 by an independent industry watchdog.

Today, Murphy is author of the *New World Investor*. In *New World Investor*, Murphy helps you to realize your financial goals by investing in the profitable opportunities from the world's MegaShifts.

Murphy is also a featured investment expert in *Worth*, is often quoted in *The Wall Street Journal*, *Barron's* and *Money*, and makes frequent appearances on CNBC and

CNNfn. He resides in Half Moon Bay, California, where he enjoys raising llamas and racing electric cars.

Here's What Michael Murphy Can Do For You!

Join Murphy's *New World Investor* advisory service today, and he will show YOU the safest way to make your fortune by investing in *MegaShifts*, which are sustainable, profitable trends that everyone else is missing. And in each weekly *New World Investor* Radar Report, Murphy will tell you which trends are emerging right now, when to invest and which companies will provide the best opportunities to profit.

Investing in MegaShifts can be a perilous game. That's why Murphy sorts out the winners and losers of each MegaShift by looking for quality management, strong business positions and attractively priced stocks before making a decision. Sometimes, there are great trends but simply no decent companies to invest in.

As a *New World Investor* member, you'll receive access to his in-depth weekly *New World Investor* Radar Report updates, urgent Flash Alerts by email when an urgent profit opportunity arises, and his special stock analysis anytime the market makes a big move. Plus, he'll personally guarantee your trial subscription with his personal six-month money-back guarantee, and send you a host of special bonus reports to get you started. Don't delay – *click here* for the profit-packed details!

© 2007 Phillips Investment Resources, LLC.
All rights reserved. Disclosures & Disclaimers
Site Map Privacy Policy Terms and Conditions

Financial Market Data powered by Quotemedia.com.
All rights reserved. Terms and Conditions NYSE/AMEX
data delayed 20 minutes. NASDAQ/other data
delayed 15 minutes unless indicated.

Get valuable insight into today's biggest market events.